

(22,471)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 200.

THE MICHIGAN TRUST COMPANY, PETITIONER,

v/s.

EDWARD P. FERRY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

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CERTIFIED TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Eighth Circuit.

No. 3107.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY, Defendant in Error.

In Error to the Circuit Court of the United States for the District
of Utah.

Filed June 28, 1909.

1 UNITED STATES OF AMERICA,
District of Utah, ss:

At a stated term of the Circuit Court of the United States for the
District of Utah, begun and held in the building used as a
United States Court House, in the City of Salt Lake in said Dis-
trict, on the second Monday, being the 13th day of April, in
the year of our Lord One Thousand Nine Hundred and Eight,
and the one hundred and thirty-second of the Independence of
the United States of America.

Present: Honorable John A. Marshall, United States District
Judge for the District of Utah.

Transcript of the Record.

No. 1021.

MICHIGAN TRUST COMPANY, a Corporation, Plaintiff,
vs.
EDWARD P. FERRY, Defendant.

Amended Complaint.

On the 14th day of December, 1908, plaintiff above named filed
its amended complaint against said defendant, which, being en-
titled in said court and cause, is in words and figures following, to-
wit:

Now comes the above named plaintiff, The Michigan Trust Com-
pany, and for its cause of action against the defendant Edward
P. Ferry, alleges by way of amended complaint:

1. That the said plaintiff, The Michigan Trust Company, is a corporation organized and existing under the laws of the State of Michigan and a citizen of said State; and the said defendant, Edward P. Ferry, is a citizen of the State of Utah and an inhabitant of the said District of Utah.

[2a]. That the Probate Court of Ottawa County in the State of Michigan is and at all times hereinafter mentioned was a court of record, having a seal, duly created and existing under and by virtue of the Constitution and laws of the State of Michigan and having general jurisdiction in probate matters.

3. That in the year 1867 one William M. Ferry, a resident and citizen of the village of Grand Haven in the County of Ottawa, State of Michigan, died, leaving a last will and testament 2 which was thereafter, and in the year 1868, duly admitted to probate in said Probate Court; and that under and by virtue of the provisions thereof and of the orders of said Probate Court duly made, the defendant Edward P. Ferry, a son of said decedent, was in said year duly appointed sole executor of said last will and testament, and thereupon duly qualified as such and entered upon his duties as such executor.

4. That thereafter and prior to the year 1901, the said Edward P. Ferry removed from the State of Michigan to the Territory, now State of Utah, and for more than seven years last past has been a citizen and resident of the County of Salt Lake and State of Utah; that in the year 1901, said defendant had become and has ever since been mentally incompetent, and on or about the 13th day of February, 1901, was, by the District Court of the Third Judicial District of the State of Utah, under proceedings duly had and taken, adjudged and declared to be an incompetent person, and W. Mont Ferry and Edward S. Ferry, residents of Salt Lake City, Utah, sons of said defendant, were duly and regularly appointed Guardians of the person and estate of said incompetent, and they immediately qualified and entered upon the discharge of their duties as such Guardians, and ever since said date have been and now are the general guardians under such appointment of the person and estate of said defendant.

5. That on or about the 26th day of June, 1903, William Montague Ferry, Amanda Harwood Hall, Hannah Elizabeth Jones, Elizabeth Eastman, Edward F. Eastman, Thomas White Eastman, George Mason Eastman, Hettie Eastman, Hannah Elizabeth Wulzen, Mary White Eastman and Mary Amanda Fairchild, the said William Montague Ferry, Amanda Harwood Hall, and Hannah Elizabeth Jones being residuary legatees and devisees under the said last will and testament of said William M. Ferry, deceased, and the other persons hereinabove in this paragraph 5 named being all of the children, heirs at law and distributees of Mary L. F. Eastman, deceased intestate, who was also a residuary legatee and devisee under said last will and testament of said William M. Ferry, deceased, filed in said Probate Court for the County of Ottawa, State of Michigan, their petition, praying for the removal of said Edward P. Ferry, defendant herein, as executor of the

last will and testament of his father, William M. Ferry, deceased, that he or his representatives be ordered to account forthwith to said Court for the residue of said estate of said deceased which was unadministered for the appointment of The Michigan Trust Company, plaintiff herein, or some other suitable person as administrator de bonis non with the will annexed of said estate, and
3 that said Probate Court make such other and further order in the premises as to it might seem proper.

6. That thereupon the said Probate Court of Ottawa County, Michigan, made and entered an order fixing July 21, 1903, as the day for the hearing of said petition and causing notice of said petition and of the time and place of the hearing thereof to be published in a newspaper directed in said order, and said order was thereupon duly published in said newspaper, being a newspaper printed, published and circulated in the said County of Ottawa, State of Michigan, and said publication was made in all respects in the manner and for the period required by the statutes of the State of Michigan and the requirements of said order; that on June 30th, 1903, a copy of the order of said Probate Court so as aforesaid fixing July 21, 1903, as the date for the hearing of the said petition was duly served on said defendant Edward P. Ferry, and upon his said guardians, W. Mont Ferry and Edward S. Ferry, in the City of Salt Lake and State of Utah.

7. That thereupon said W. Mont Ferry and Edward S. Ferry as guardians as aforesaid of the defendant Edward P. Ferry employed and retained on behalf of said Edward P. Ferry, as his counsel in said matter and proceeding and for the hearing on said petition, the law firm of Smith, Nims, Hoyt and Erwin, attorneys at law of the City of Muskegon, Michigan; that thereafter and to-wit, on July 21, 1903, the day fixed for the hearing of said petition, there appeared before the said Probate Court for Ottawa County, State of Michigan, at the Court House in the City of Grand Haven, one John Vanderwerp, an attorney and counsellor at law of said Court, then a member of, associated with or employed by said law firm so employed and retained, and David D. Erwin, one of the members of said law firm so employed and retained, both of the City of Muskegon, State of Michigan; and thereupon, the said petition having been brought on for hearing, the said Edward S. Ferry appeared in open Court in person, and the family of Ed-
P. Ferry, defendant herein, appeared by said John Vanderwerp; and the said John Vanderwerp, then and there employed for that purpose by the guardians of said defendant under the order and permission of the said District Court of the Third Judicial District of Utah, represented to said Probate Court that it would be necessary to file on behalf of said Edward P. Ferry, defendant herein, an answer to said petition and to claim in such answer affirmative relief, and said John Vanderwerp then and there requested on behalf of said family of said Edward P. Ferry, defendant herein, that said David D. Erwin be appointed guardian ad litem and next friend for said Edward P. Ferry, defendant herein; and
4 thereupon by the order of said Probate Court, the said David D. Erwin, employed and retained as aforesaid, was appointed

guardian ad litem and next friend for said Edward P. Ferry, defendant herein, to represent him in the matter of said petition, as well as to prosecute any proceedings that he might be advised necessary to be taken on behalf of said Edward P. Ferry, defendant herein, to obtain affirmative relief in matters relative to said estate of William M. Ferry, deceased. That on the same day the said executor, Edward P. Ferry, defendant herein, by the said David D. Erwin, his guardian ad litem and next friend, by the procurement and under the employment of the said guardians as aforesaid and authorized and permitted so to do by the Court of their appointment, filed his answer to the said petition, and filed also in said matter at the same time a cross-petition, praying for affirmative relief, the same being duly filed in open court in the presence of said Edward S. Ferry, son and guardian of said defendant, Edward P. Ferry. That said answer and cross-petition had been prepared by said Smith, Nims, Hoyt and Erwin under their employment and retainer by said guardians on behalf of said Edward P. Ferry, defendant herein, prior to the appointment of said David D. Erwin as guardian ad litem as aforesaid, and immediately upon such appointment said answer and cross-petition was subscribed by Edward P. Ferry defendant herein, by his said guardian ad litem and next friend, and by Smith, Nims, Hoyt and Erwin, as attorneys, said attorneys having been employed and authorized for that purpose by the said general guardians, who were directed and permitted so to employ said attorneys by the said Court of their appointment. That the affirmative relief prayed for in said cross-petition was that the said Probate Court by order declare and determine that the said estate of William M. Ferry had been fully administered and closed, that said executor be discharged and his bond as such be cancelled, and that said executor have such other and further relief as to the Court might seem meet.

That thereafter the answer of the original petitioners to said cross-petition was filed, and issue was thereby joined and the accounting suit was set for hearing before said Probate Court and subsequently came on for trial. That during the progress of said accounting suit the said Edward P. Ferry, defendant herein, appeared therein and was represented by said law firm of Smith, Nims, Hoyt and Erwin, afterwards Nims, Hoyt, Erwin, Sessions & Vanderwerp, afterwards Nims, Hoyt, Erwin & Vanderwerp, as also by Willard Kingsley, Esq., and Arthur C. Denison, Esq., attorneys at law of Grand Rapids, Michigan, George A. Farr, Esq., attorney at law of Grand Haven, Michigan, and Joseph T. Richards, Esq., and William H. Dickson, Esq., attorneys at law of Salt Lake City, Utah, all of whom were retained and employed on behalf of said Edward P. Ferry, defendant herein, by his said guardians, W. Mont Ferry and Edward S. Ferry and paid by said guardians out of the funds and estate of said Edward P. Ferry, defendant herein, under the order, direction and approval of said District Court for the Third Judicial District for the County of Salt Lake and State of Utah, whereby said guardians were authorized to defend said litigation in the

Probate Court of Ottawa County and State of Michigan aforesaid against said Edward P. Ferry, defendant herein, and all other litigation which might be instituted against him, and to pay all necessary expenses connected therewith. That on August 29, 1907, said Arthur C. Denison, Esq., was by order of said Probate Court of Ottawa County, Michigan, substituted as attorney of record for such guardian ad litem and next friend in the place and stead of said Nims, Hoyt, Erwin & Vanderwerp, and at said time David D. Erwin resigned his trust as guardian ad litem and next friend of the said Edward P. Ferry. Such resignation was presented to the Probate Court for Ottawa County, Michigan, and accepted by order of said Court on August 29, 1907. On the same day said Denison, under employment of said guardians, presented, on behalf of W. Mont Ferry and Edward S. Ferry, acting as the sons of said defendant Edward P. Ferry and in their father's interest, to said Probate Court by petition the name of one Frederick W. Stevens as guardian ad litem and next friend in the place and stead of said David D. Erwin and requested his appointment as such. Said request for the appointment of said Stevens as such guardian ad litem and next friend was accompanied by and based upon the written request of said W. Mont Ferry and Edward S. Ferry, in which they requested that said Judge of Probate should fill said vacancy caused by the intended resignation of said Erwin by the appointment of said Stevens; or if for any reason said Stevens should not be available, then by the appointment of some other person to be selected by said Denison. On the same day, pursuant to such written request, said Frederick W. Stevens was appointed by the order of said Court guardian ad litem and next friend of the said defendant Edward P. Ferry, and he thereupon accepted said appointment, which still remains in full force and effect. That from the time when said defendant Edward P. Ferry, by his son and his counsel, appeared as aforesaid in said Probate Court of Ottawa County, Michigan, in said matter of the petition filed by said petitioners in the estate of William M. Ferry, deceased, on July 21, 1903, and procured the appointment of said Erwin as guardian ad litem and next friend of said defendant Edward P. Ferry, down to the present time, the litigation concerning the issues raised by the said petition, answer and cross-petition and the answer thereto, and in the matter of the said accounting, and numerous applications to other courts of Michigan for mandamus and other relief in respect of said proceedings pending in said Probate Court, has been conducted for and on behalf of said Edward P. Ferry, defendant herein, under the direction and control of said W. Mont Ferry and Edward S. Ferry, sons and guardians of said defendant Edward P. Ferry, and under the direction and control and subject to the orders of the District Court of the Third Judicial District of the State of Utah for the County of Salt Lake, and all the costs, fees and expenses incurred by the said sons and guardians in the conduct of said suit in the said Probate Court for Ottawa County, Michigan, have from time to time been paid by the said guardians of said defendant, and most if not all of said payments and expendi-

tures have been reported to and authorized and allowed by said District Court of the Third Judicial District of Utah for the County of Salt Lake as payment out of the estate of the said defendant Edward P. Ferry then and there in the course of administration. That at all times since 1901, the said defendant has been a resident of the State of Utah and has not at any time since 1901 been personally present within the State of Michigan.

8. That on or about said 26th day of June, 1903, this plaintiff was, on application of said petitioners and in full compliance with the laws of said State of Michigan in such case made and provided, duly appointed by said Probate Court of Ottawa County, Michigan, as special administrator of said estate of William M. Ferry, deceased, and thereupon accepted said appointment and qualified as such, and took possession of the assets of said estate in Michigan and ever since has been down to the 2nd day of January, 1908, the duly appointed, qualified and acting special administrator of said estate;

That during the [course] of said litigation in the Probate Court of Ottawa County, Michigan, and to-wit, in or about the year 1905, the petitioner William Montague Ferry departed this life, and this plaintiff was duly appointed by said Probate Court administrator with the will annexed for the State of Michigan of the estate of said William Montague Ferry, deceased, and thereupon accepted said appointment and qualified as such, and ever since has been and now is the duly appointed, qualified and acting administrator with the will annexed for the State of Michigan of the estate of said William Montague Ferry, deceased, and as such was by order of said Probate Court of Ottawa County, Michigan, duly substituted
7 for said William Montague Ferry as petitioner in said litigation, and was such party petitioner at the time of the rendition of the decree therein hereinafter set forth;

That during the course of said litigation in the Probate Court of Ottawa County, Michigan, to-wit, in or before the year 1905, by order of said Court this plaintiff was duly appointed as and thereupon qualified and ever since has been and now is the duly appointed, qualified and acting administrator for the State of Michigan of the estate of Mary L. F. Eastman, deceased, one of the children and residuary legatees and devisees of said William M. Ferry, deceased in 1867 as aforesaid and as such was by order of said Probate Court of Ottawa County, Michigan, duly made a party petitioner in said litigation, and was such party petitioner at the time of the rendition of the decree therein hereinafter set forth.

9. That during the course of said litigation in the said Probate Court of Ottawa County, Michigan, proofs were offered by said petitioners and by said Edward P. Ferry, respectively, and were taken upon the issues joined, to-wit, the issue raised by the petition of said petitioners and the answer of the said defendant Edward P. Ferry thereto, and the issues raised by the cross-petition of the said Edward P. Ferry and the answer of the said petitioners thereto; and thereafter such proceedings were had that the matter was submitted to said Probate Court for decision, and after full considera-

tion, on, to-wit, the 31st day of December, 1907, at a session of said Probate Court duly [held] at the City of Grand Haven, Ottawa County, Michigan, a decree or judgment was by said Probate Court made, rendered, entered and docketed in favor of this plaintiff and said other petitioners and against the said defendant Edward P. Ferry, by which judgment or decree it was ordered, adjudged and decreed that the cross-petition of said defendant be denied, that said defendant Edward P. Ferry, as executor of the last will and testament of said William M. Ferry deceased, be removed forthwith from his office as such executor; that The Michigan Trust Company, one of the petitioners therein and plaintiff herein, be and is appointed as administrator de bonis non with the will annexed of said William M. Ferry, deceased, said appointment to take effect on the filing in said Probate Court by said The Michigan Trust Company of its acceptance of said trust; that said Edward P. Ferry, defendant herein, is individually liable for an indebtedness of Nine Hundred and Fifteen Thousand Three Hundred Fifty-five and 8/100 Dollars (\$915,355.08) to the estate of William M. Ferry, deceased, and that said Edward P. Ferry do pay within sixty days from the 8 date of the rendition of said judgment or decree to The Michigan Trust Company, plaintiff herein, the sum of Nine Hundred and Fifteen Thousand Three Hundred Fifty-five and 8/100 Dollars (\$915,355.08), together with interest on said sum from December 31, 1907, until paid at the rate of five per cent (5 per cent) per annum. A true copy of said decree is hereto attached marked "Exhibit A" and made a part of this complaint.

That thereafter, on to-wit, January 2, 1908, this plaintiff duly filed in said Probate Court its acceptance of said trust, and ever since said last named date has acted and has been and now is recognized by said Probate Court as the administrator de bonis non with the will annexed of said William M. Ferry, deceased.

10. That under the law at all times in force in said State of Michigan, the said Edward P. Ferry, defendant herein, by accepting the office of executor under appointment by said Probate Court, and qualifying thereunder, and by his oath of office and bond as such executor, subjected himself to and ever since, down to the time of his removal by said Probate Court of Ottawa County, Michigan, on December 31, 1907, has been subject to the direction and jurisdiction of said Probate Court in respect of said estate of William M. Ferry, deceased, and amenable to all orders, judgments and decrees of said Probate Court touching upon the discharge of the duties of his said office of executor.

11. That all of said proceedings in said Probate Court of Ottawa County, Michigan, were duly had in full compliance with the law then in force in said State of Michigan.

12. That said judgment or decree under the law then and now in force in said State of Michigan is a final judgment or decree against the defendant Edward P. Ferry, and has been treated as such by all parties to said litigation in Michigan, including the said Edward P. Ferry, defendant herein, as appearing therein by his guardian ad litem and next friend and his counsel therein aforesaid, as also by

the said Probate Court, and the Circuit Court of Michigan for the County of Ottawa, and remains in full force and effect and has not been appealed from; that the said decree is wholly unsatisfied, and by reason of the premises the defendant Edward P. Ferry became and is indebted to the plaintiff in the sum of Nine Hundred and Fifteen Thousand Three Hundred Fifty-five and 8/100 Dollars (\$915,355.08) with interest from December 31, 1907, at the rate of five per cent per annum.

Wherefore plaintiff prays judgment against the said defendant in the sum of Nine Hundred and Fifteen Thousand Three
9 Hundred Fifty-five and 8/100 Dollars (\$915,355.08), with interest from December 31, 1907, at the rate of five per cent per annum, and costs of this action.

HENDERSON, PIERCE, CRITCHLOW &
BARRETTE, *Attorneys for Plaintiff.*

STATE OF UTAH,

County of Salt Lake, ss:

E. B. Critchlow, being first duly sworn, deposes and says: That he is one of the counsel for the plaintiff, The Michigan Trust Company, herein, and makes this verification on behalf of said plaintiff for the reason that plaintiff is absent from the State of Utah and has no officer or agent other than affiant within the State of Utah, that affiant has read the foregoing Amended Complaint and knows its contents and that the same is true.

E. B. CRITCHLOW.

Subscribed and sworn to before me this 12th day of December, 1908.

JAMES H. BALL,
Notary Public.

My Commission Expires May 27, 1912.

EXHIBIT "A."

STATE OF MICHIGAN:

In the Probate Court for the County of Ottawa.

At a Session of said Court Held at the Court House in the City of Grand Haven, in said County, on the 31st Day of December, A. D. 1907.

Present: Honorable Edward P. Kirby, Judge of Probate.

In the Matter of the Estate of WILLIAM M. FERRY, Deceased.

This matter came on to be heard on the petition filed herein for the removal of Edward P. Ferry, Executor of the last will and testament of William M. Ferry, deceased, and for an account-

ing by said Executor, in which petition the following persons are petitioners, viz: The Michigan Trust Company, Administrator with the will annexed for the State of Michigan, of the Estate of William Montague Ferry, deceased, Amanda Harwood Hall, Hannah Elizabeth Jones, Mary Amanda Fairchild, Edward F. Eastman, Elizabeth Eastman, Thomas White Eastman, Hettie Eastman, Hannah Elizabeth Wulzen, Mary White Eastman, George Mason Eastman and

10 The Michigan Trust Company, Administrator for the State of Michigan of the Estate of Mary L. F. Eastman, deceased, and also on the answer and cross-petition of Edward P. Ferry, a mentally incompetent person appearing by his guardian ad litem and next friend Fred W. Stevens, and also on the answer of said petitioners to said cross-petition.

Proofs were taken in behalf of the respective parties, and after argument had, an interlocutory order was made by this Court directing that the said Executor Edward P. Ferry, appearing by his guardian ad litem and next friend Fred W. Stevens, do file in this Court a more detailed statement of account of the receipts and disbursements of said Executor on account of said estate since the filing of the second annual account of the Executor, including the disposition (if any has been made) of the properties on hand at the date of said second annual account, and the other properties (if any there be) belonging to said estate, which have not already been accounted for by said Executor in this Court;—such statement of account to give the dates and items of such receipts and disbursements so far as reasonably practicable.

Thereupon said Executor contended before this Court that the powers of attorney, written authorizations, mortgages, deeds and other conveyances, alleged to have been made in pursuance of such powers of attorney and authorization, constitute and are a full, complete and final account of said Executor in this Court, as the representative of said estate, and that said Executor should not be required to render any or further account in this Court; and the said Executor neglected and refused to render any other or further account than as herein specified, insisting upon the approval of his said alleged final account and that this Court made an order declaring that the estate of said deceased has been fully administered, and closed and discharging said Edward P. Ferry as Executor, and cancelling the said Executor's bond, and releasing and discharging the sureties thereon.

Thereafter, pursuant to leave of the Court, further proofs were taken in said cause, and after the same were concluded, and as preliminary to a final order hereon on the merits, by like leave of the Court, the petitioners for accounting made and submitted to the Court a statement charging, surcharging and falsifying the alleged final account of Edward P. Ferry as Executor of the last will and testament of said deceased, already before the Court; which statement presented the proposed amendments and objections of petitioners to the said alleged final account of said executor with said estate and stated said account as petitioners claim the same to be. After

11 the submission of said statement the accountant for petitioners was cross-examined, and thereupon the proofs in said cause were concluded and the cause was submitted to the Court for its consideration and decision, and has been held under advisement by this Court until the present time, the earlier decision of the cause having been restrained by certain proceedings in mandamus in the Circuit Court.

It is also made to appear to the satisfaction of the Court, by affidavit on file, that the order of the Court touching the examination of the final account of said Executor made on the 6th day of March, 1907, has been duly published as therein directed, giving all persons interested in said estate notice of the same, and that personal notice has also been given to all persons interested of the examination of said final account of said Executor, and the alleged final account of said Executor and all the other statements and accounts hereinbefore referred to have been carefully examined and corrected by the Court.

And, after due deliberation, the Court finds the following facts for this cause.

I.

Said William M. Ferry died on December 30th, 1867, leaving a last will and testament, which was duly admitted to probate in this Court, and letters testamentary were issued by this Court to his son, Edward P. Ferry, the Executor therein named, on February 24th, 1868.

II.

Said William M. Ferry at his death was a resident and inhabitant of Ottawa County, and left a large estate in said County, and elsewhere, to be administered, the same consisting of real and personal property.

III.

Said Edward P. Ferry qualified as such Executor and entered upon the duties of his trust, and filed two annual accounts in this Court, one on March 29, 1869, the other on March 10th, 1870, since which date he has filed in this Court no account of his administration except such account as [in] contained in the answer and cross-petition of said Executor, appearing by his said guardian ad litem and next friend in this accounting suit, and in the powers of attorney, written authorizations and mortgages, deeds and other conveyances alleged to have been made in pursuance of such powers of attorney and authorizations, all of which papers are claimed by said Executor to be and constitute a full, complete and final account of said Edward P. Ferry in this Court, as the representative of said estate, and he has asked this Court to accept them as such and thereupon to discharge him as such Executor.

IV.

The Court finds that the accounts specified in the preceding paragraph are not true or correct; that said Executor has not accounted for all the moneys and properties of said estate coming to his hands;

that he is not entitled to be discharged from his trust; that at the time of the rendition of his second annual account, said Executor had on hand large sums of money and a large amount of property belonging to said estate, and since that date large amounts, both of money and property, belonging to said estate, have come to the hands of said Executor from time to time, down to and including the year 1900,—none of which has been accounted for by said Executor in this Court; that large sums of money belonging to said estate, as well also as many and valuable properties belonging thereto, have come to the hands of said Edward P. Ferry and have been misappropriated by him and converted to his individual use instead of being applied to or for the benefit of said estate.

V.

In or about the year 1878 said Edward P. Ferry removed from the State of Michigan and established his residence in the Territory, now State of Utah, and he has ever since been and now is a resident of Utah, and is now domiciled at Salt Lake City, and is, and since in or about 1878 has been, a non-resident of Michigan.

VI.

On or about February 10th, 1892, the^d said Edward P. Ferry was, and ever since has been, and now is, a mentally incompetent person; and the Court finds that because of his mental incompetence, and also because of the misappropriation and conversion by him to his own uses of the assets of said estate, and the mismanagement of the affairs of the estate, he is wholly unsuitable and incapable to discharge the duties and office of Executor of said will.

VII.

All the debts, expenses of administration, and the specific and money legacies in said will of said deceased, have been fully paid and satisfied, but the residuary legatees and devisees have not been paid or satisfied, and all persons interested in the residue of said estate are now before this Court, excepting, however, that as specified in paragraph XIX of this decree, the rights of the Presbyterian House and the Lake Forest University under clause 6th of this will are not determined at this time.

VIII.

Under the will of said deceased, said Edward P. Ferry was himself entitled to the one-fourth part of the residue of said estate, and the petitioners for accounting hereinbefore named are the persons entitled to the remaining three-fourths part of said residue, save that said Thomas W. Ferry, now deceased, was entitled to the one-fourth part of the residue of said estate. Said Thomas W. Ferry died in the year 1896 at Grand Haven, being at the time of his death a resident and inhabitant of Ottawa County, and leaving estate therein

to be administered, and R. Andrew Fleming is the Administrator de bonis — of his estate. Said R. Andrew Fleming, as such Administrator de bonis non, has been duly cited to appear in this accounting suit; and the persons beneficially interested in the estate of said Thomas W. Ferry as distributees thereof, are the petitioners for accounting hereinbefore named and said Edward P. Ferry, all of whom are now before this Court in this cause.

IX.

The Court finds that the estate of William M. Ferry, has not been fully administered: that said Executor is not entitled to an order closing the same: that it was and is the duty of said Edward P. Ferry to render a true and perfect account of his doings as Executor, but that he has neglected and refused to do so: that those acting in behalf of said Executor have taken from Michigan to Utah books and papers of said Edward P. Ferry containing his accounts as Executor of the last will and testament of his said father, and have refused to return the same when ordered by this Court to do so, and have refused to make and render an account of said executor with said estate, except as hereinbefore specified, and so far as lies in their power have suppressed evidence in said cause and endeavored to prevent the decision of said cause on the merits: that it has, therefore, become necessary for this Court to state said accounts from the proofs in this cause: that the proofs afford such data as to enable the Court to state the same truly and correctly and in such manner as to do no injustice to said Executor: that in stating said account it is not possible for the Court to determine in all cases the profits on investments made by the Executor of the funds of said estate, and for this reason it is the view of the Court that it will best accord with substantial justice to award, in lieu of profits, simple interest at the legal rate on sums misappropriated by said Executor or converted by him to his own use, first deducting therefrom credits to which the Executor is entitled, such interest to be computed from the end of each year in such manner as not to compound
14 the same. The Court finds errors, mistakes and fraud in the rendition and the procuring by said Executor of the allowance of the two annual accounts filed by said Executor in this Court on March 29th, 1869, and March 10th, 1870, and in so far as the Court finds errors, mistakes and frauds, in said two annual accounts, it determines that the same are subject to correction upon this final accounting.

X.

The Court finds to be in part erroneous the following charge against said Executor as shown in petitioners' account, viz:—July 7, 1868, from Eben B. Mansfield, for sale of N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ of Sec. 28, T. 8 N., R. 16 W., 20 acres being farm orchard, \$4,666.67. The Court disallows \$5,333.33 of said charge, but charges against the Executor the following additional sums on account of interest collected by him on the Eben B. Mansfield mortgage, viz:

July 14, 1869, Interest collected on Mansfield mortgage and

credited on E. P. Ferry's blotter, Exhibit 21, page 248, \$373.33. July 13, 1870, interest collected on Mansfield mortgage and credited on E. P. Ferry's blotter, Exhibit 22, page 116, \$373.33 with the exceptions hereinbefore in this paragraph stated, the Court allows, approves and adopts the account of said Executor with said estate as presented by said petitioners and filed in this cause, as and for a correct statement of principal sums owing by said Edward P. Ferry, Executor of said estate. The Court also finds and determines that, upon the balance owing to the estate by said Edward P. Ferry, Executor, at the end of each year, interest is to be computed at the legal rate, but not in such manner as to compound the same; such legal rate being as follows:—7% from December 30, 1867, to September 27, 1887; 6% from September 27, 1887 to September 22, 1899; 5% from September 22, 1899 to the date of this decree. The Court directs that interest be computed accordingly, and with the addition of such interest and the modifications specified in this paragraph of the decree, the Court finds and determines said account so presented by said petitioner to be just, true and correct.

XI.

From the proofs in the cause, the Court finds and determines that, after crediting all disbursements, said Edward P. Ferry, Executor as aforesaid, is indebted to the estate of Reverend William M. Ferry, deceased, at this date, upon balance of account, in the full and true sum of One Million Two Hundred and Twenty Thousand Four Hundred and Seventy-three and 44/100 Dollars (\$1,220,473.44);

and that said sum of money is now justly due and owing
15 by said Edward P. Ferry to said estate, over and above all
legal set-offs or counterclaims.

XII.

It is Therefore Ordered, Adjudged and Decreed that the prayer of the cross-petition of said Executor Edward P. Ferry, appearing herein by Fred W. Stevens, his guardian ad litem and next friend, wherein it is asked that an order be made by this Court determining and declaring that the estate of William M. Ferry, deceased, has been fully administered and closed, and discharging the said Edward P. Ferry as Executor, cancelling said Executor's bond, and releasing and discharging the sureties therein, be and the same is hereby denied.

XIII.

It is further ordered, adjudged and decreed that said Edward P. Ferry be and he is hereby removed forthwith from his office as Executor of the last will and testament of William M. Ferry, deceased. The grounds of such removal are the following:

- (a) The mental incompetence of said Executor;
- (b) His residence out of this State;
- (c) His neglect, after due notice given by the Judge of Probate, to render his account and settle the estate according to law.

(d) His neglect to perform various decrees of this Court;
(e) His misappropriation and conversion to his individual use of the assets of said estate, and becoming otherwise unsuitable to perform his trust;

All of which grounds above stated the Court finds to be true.

XIV.

It is further ordered, adjudged and decreed that The Michigan Trust Company, a corporation of Grand Rapids, Michigan, be, and it is hereby appointed Administrator de bonis non with the will annexed of the estate of said Reverend William M. Ferry, deceased,—such appointment to take effect forthwith upon the filing in this Court by the Michigan Trust Company of its acceptance of said trust.

XV.

Inasmuch as it appears from the proofs that said Edward B. Ferry has been guilty of waste and mismanagement in the affairs of said estate, and has misappropriated and converted to his own use the assets of the estate in a large sum, and has thereby entailed great loss and expense upon the persons interested in said estate, is further ordered, adjudged and decreed that no commission, executor's fees or compensation be awarded to him for his services, save only the compensation allowed in the first and second annual accounts of said Executor, which allowances are not disturbed.

XVI.

It is made to appear to this Court that the said Edward P. Ferry is himself a residuary legatee under his said father's will, and as such is entitled to a one-fourth interest in the residue of said estate, and that it might impose a hardship upon him if he were compelled to pay over to the Administrator de bonis non with the will annexed that portion of said estate to which, on final distribution, he would be adjudged to be entitled. For this reason no order is made directing such payment to said Administrator de bonis non with the will annexed of said one-fourth share of the net balance fixed and determined in paragraph XI of this decree. Said Edward P. Ferry will be excluded from participating in the distribution of the remaining three-fourths of the moneys owing under the terms of this decree, except in so far as he may show himself entitled to participate as a distributee of Thomas W. Ferry's estate.

XVII.

The remainder of the indebtedness owing by said Edward P. Ferry, said Executor to the estate of said William M. Ferry, deceased is the sum of Nine Hundred and Fifteen Thousand Three Hundred and Fifty-five and 08/100 Dollars (\$915,355.08), and it is further ordered, adjudged and decreed that said Edward P. Ferry is individually liable therefor to the estate of William M. Ferry,

deceased, and that, within sixty days from this date, said Edward P. Ferry, said Executor, do pay the sum of Nine Hundred and Fifteen Thousand and Three Hundred and Fifty-five and 08/100 Dollars (\$915,355.08) to the Michigan Trust Company, Administrator de bonis non with the will annexed of the estate of said William M. Ferry, deceased, together with interest on said sum from this date until paid at the rate of five (5%) per cent per annum.

XVIII.

Upon the making of the payment specified in the preceding paragraph of this decree and filing due proof thereof in this Court said Edward P. Ferry shall be discharged from all further obligation as Executor of his father's estate, and his bond shall be cancelled.

17

XIX.

And it further appearing to the Court that the Presbyterian House and the Lake Forest University, claiming to be beneficiaries under the sixth clause of said will, are intervening petitioners, asking for a construction of the sixth clause of said will and for a determination of their rights thereunder; that the construction of the sixth clause of said will and of the rights of said Presbyterian House and of said Lake Forest University thereunder is not necessary to a determination of the balance to be turned over to the administrator de bonis non with the will annexed of said estate by said Executor, and that the turning over of said balance to said administrator de bonis non can in no way interfere with the rights of said Presbyterian House, or of said Lake Forest University; that the Presbyterian House has submitted the matter, so far as it is concerned, but that said Lake Forest University has not yet submitted the same; that it is better that the rights of both said House and University should be considered and decided at the same time; that a further delay of a decision in the accounting matter would be a hardship on the other petitioners and that the rights of the Presbyterian House and of the Lake Forest University, if any, are those of distributee and can be determined without hardship to either of them at any time before the final distribution of said estate has been made, and within a reasonable time after the matter has been submitted to this Court.

It is therefore further ordered that nothing in this order shall be construed as a determination of the rights of said Presbyterian House, or of said Lake Forest University, under said clause sixth of said will.

EDWARD P. KIRBY,
Judge of Probate.

Filed Dec. 14, 1908. Jerrold R. Letcher, Clerk.

Demurrer to Amended Complaint.

And afterwards and on the 22nd day of December, 1908, defendant filed demurrer to said amended complaint, which, being entitled in said court and cause, is in words and figures following, to-wit:

Comes now the defendant, Edward P. Ferry, an incompetent person, appearing by William Montague Ferry and Edward Stewart Ferry, his general guardians, and demurs to the plaintiff's amended complaint, and for cause of demurrer alleges:

18 That the said amended complaint does not state facts sufficient to constitute a cause of action.

RICHARDS, RICHARDS & FERRY,
Attorneys for Defendant.

VAN COTT, ALLISON & RITER,
Of Counsel.

I, Joseph T. Richards, one of the attorneys for the defendant in the above entitled action, do hereby certify that, in my opinion the foregoing demurrer is well founded in point of law, and it is not interposed for delay.

Dated December 22, 1908.

JOSEPH T. RICHARDS.

Received copy December 22, 1908.

HENDERSON, PIERCE, CRITCHLOW
& BARRETTE, *Attorneys for Plaintiff.*

Filed Dec. 22, 1908. Jerrold R. Letcher, Clerk.

Order Sustaining Demurrer to Amended Complaint & Denying Motion to Amend.

And afterwards and on the 6th day of March, 1909, an order was made in re demurrer to amended complaint and in re motion to amend, which, being entitled in said court and cause, is in words and figures following, to-wit:

This cause having been heretofore submitted on defendant's demurrer to the amended complaint herein, and also upon plaintiff's motion for leave to file an amendment to the 12th paragraph of the amended complaint herein, and by the Court taken under advisement, Now, after due consideration, it is Ordered by the Court that said demurrer be sustained, and that plaintiff's motion to file amendment be denied.

J. A. MARSHALL, Judge.

Motion to Dismiss.

And afterwards and on the 9th day of March, 1909, defendant filed motion to dismiss this cause, which, being entitled in said court and cause, is in words and figures following, to-wit:

To the plaintiff and Messrs. Henderson, Pierce, Critchlow and Barrette, its attorneys:

The Court having sustained the defendant's demurrer and denied the application of the plaintiff for leave to amend in

19 the above entitled action, now comes the defendant and moves the Court to dismiss the said cause at plaintiff's cost.

RICHARDS, RICHARDS & FERRY,
Attorneys for Defendant.

VAN COTT, ALLISON & RITER,
Of Counsel.

Dated March 9, 1909.

I, Joseph T. Richards, one of the attorneys for the defendant in the above entitled action, certify that, in my opinion, the foregoing motion is well founded in point of law and is not interposed for delay.

JOSEPH T. RICHARDS.

Copy received M'ch 9, 1909. H. P. Critchlow & B.' att'y's for Plff. Filed March 9-1909. Jerrold R. Letcher, Clerk, By Margaret B. Connell, Deputy.

Bill of Exceptions.

And afterwards and on the 15th day of March, 1909, plaintiff filed its bill of exceptions to the ruling of the Court, which, being entitled in said Court and Cause, is in words and figures following, to-wit:

Know All Men By These Presents: That on the 1st day of February, 1909 in open Court, counsel for defendant being present, counsel for the plaintiff, by leave of Court, moved to be permitted to further amend the amended complaint of plaintiff herein in the following particular, to-wit:

By inserting in the 12th paragraph of said amended complaint, after the words, "and has not been appealed from" the following:

"That on to-wit the 10th day of February, 1908, the said defendant Edward P. Ferry, by Frederick W. Stevens, his guardian ad litem and next friend, appearing by said Denison as his attorney, filed in said Probate Court a notice of appeal to the Circuit Court of Ottawa County from said decree Exhibit "A", together with the reasons therefor incorporated in said notice, as required by law, and at the same time tendered to the said Probate Judge for his approval a bond on said appeal executed by said defendant, and ever since said last named date has by said guardian ad litem and next friend and the said attorney been seeking by various proceedings in the Circuit Court of Ottawa County and in the Supreme Court of Michigan to compel the said Probate Court of

Ottawa County to accept and approve said bond and allow 20 said appeal: and in the course of the proceeding so taken as aforesaid, to-wit in a petition to the said Circuit Court for Ottawa County for a Writ of Mandamus, said defendant by his said guardian ad litem and next friend, averred and showed to the Court that the said Probate Court on December 31, 1907,

rendered a final decree in said estate of William M. Ferry, deceased, to-wit, the decree Exhibit "A" hereunto attached."

Whereupon the Court, after considering the same together with the allegations of said amended complaint, denied said motion and refused to permit the said amendment upon the ground and for the reason only that said amendment so offered by plaintiff contained allegations of matters all of which were immaterial and irrelevant to the cause of action set forth in said amended complaint.

And to the said order and ruling so made plaintiff duly excepted and said exception was allowed by the Court.

And thereafter on the 6th day of March, 1909, the Court having considered the demurrer interposed herein by the defendant to the amended complaint of plaintiff, which demurrer was taken upon the ground and for the reason that the said amended complaint does not state facts sufficient to constitute a cause of action, made and entered herein its order sustaining said demurrer, to which ruling plaintiff by its counsel duly excepted and said exception was allowed.

And because the foregoing are matters proper to be incorporated in a Bill of Exceptions, now upon motion of counsel for plaintiff and upon notice to counsel for defendant the above and foregoing is hereby signed and sealed as and for plaintiff's Bill of Exceptions herein.

Dated March 15th, 1909.

J. A. MARSHALL, *Judge.*

Filed March 15-1909. Jerrold R. Lether, Clerk.

Judgment.

And afterwards and on the 29th day of March, 1909, judgment of dismissal was entered herein, which, being entitled in said court and cause, is in words and figures following, to-wit:

At this day comes E. S. Ferry, attorney for said defendant, and on his motion, it is Ordered that this cause be and it is hereby dismissed at plaintiff's costs.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is Considered, Ordered and Adjudged that said plaintiff take nothing by its complaint herein and that said defendant go hence hereof without day; and it is further Ordered that said defendant, Edward P. Ferry, do have and recover of and from said plaintiff, Michigan Trust Company, a corporation, his costs herein incurred and taxed at the sum of \$26.35; and let execution issue therefor.

Petition for Writ of Error.

And afterwards and on the 22nd day of May, 1909, plaintiff — petition for writ of error, which, being entitled in said Court and Cause, is in words and figures following, to-wit:

Comes now the above named plaintiff, the Michigan Trust Company, by its Attorneys, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause in said United States Circuit Court for the District of Utah, in favor of said defendant and against said plaintiff, on the 29th day of March, 1909, manifest error hath happened, to the great damage of said plaintiff—

Wherefore, said plaintiff prays for the allowance of a Writ of Error and for an Order allowing said plaintiff to prosecute a Writ of Error to the United States Circuit Court of Appeals for the Eighth Circuit, and also for an Order fixing the amount of bond for a supersedeas and for costs in said cause, and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals for the Eighth Judicial District.

Dated this 22 day of May, A. D. 1909.

HENDERSON, PIERCE, CRITCHLOW
& BARRETTE,
E. B. CRITCHLOW,
H. C. HALL,

Attorneys for Plaintiff.

HENDERSON, PIERCE, CRITCHLOW
& BARRETTE, *Of Counsel.*

Filed May 22, 1909, Jerrold R. Letcher, Clerk. By Margaret B. Connell, Deputy Clerk.

Upon motion of E. B. Critchlow, Esq., Attorney for plaintiff, and upon filing an assignment of errors, It is Ordered that the foregoing petition be allowed and a writ of error is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby 22 is fixed at Five Hundred Dollars (\$500.), the same to operate also as supersedeas.

Dated May 31, 1909.

WALTER H. SANBORN,
U. S. Circuit Judge.

Assignment of Errors.

And afterwards and on the 22nd day of May, 1909, plaintiff filed its assignment of errors, which, being entitled in said court and cause, is in words and figures following, to-wit:

Comes now the plaintiff in the above entitled action and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above entitled cause on the judgment made and given therein by this Honorable Court on the 29th day of March, 1909:

1. That the United States Circuit Court in and for the District of Utah erred in refusing and denying the motion of plaintiff made on the 1st day of February, 1909, to be permitted to amend paragraph 12 of the amended complaint herein by inserting after the words "has not been appealed from" the following, to wit: That on to wit the 10th day of February, 1908, the said defendant Edward P. Ferry, by Frederick W. Stevens, his guardian ad litem and next friend, appearing by said Denison as his attorney filed in said Probate Court a notice of appeal to the Circuit Court of Ottawa County from said decree, Exhibit "A", together with the reasons therefor incorporated in said notice, as required by law, and at the same time tendered to the said Probate Judge for his approval a bond on said appeal executed by said defendant, and ever since said last named date has by said guardian ad litem and next friend and the said Attorney been seeking by various proceedings in the Circuit Court of Ottawa County and in the Supreme Court of Michigan to compel the said Probate Court of Ottawa County to accept and approve said bond and allow said appeal; and in the course of the proceedings so taken as aforesaid, to-wit, in a petition to the said Circuit Court for Ottawa County for a Writ of Mandamus, said defendant by his said guardian ad litem and next friend, averred and showed to the Court that the said Probate Court on December 31, 1907, rendered a final decree in said estate of William M. Ferry, deceased, to-wit, the decree Exhibit "A" hereunto attached.

2. That the said United States Circuit Court in and for the District of Utah erred in making and entering on March 6th, 1909, the order herein sustaining the demurrer of the defendant to the amended complaint of plaintiff.

23 3. That the Said United States Circuit Court for the District of Utah erred in making and entering herein on the 29th day of March, 1909, its final judgment in favor of the defendant and against the plaintiff, dismissing this cause.

Dated May 22, 1909.

HENRY C. HALL,
E. B. CRITCHLOW,
Attorneys for Plaintiff.

HENDERSON, PIERCE, CRITCHLOW &
BARRETTE, *Of Counsel.*

Filed May 22, 1909. Jerrold R. Letcher, Clerk. By Margaret B. Connell, Deputy Clerk.

Bond on Writ of Error.

And afterwards and on the 31st day of May, 1909, bond on writ of error was duly approved by Walter H. Sanborn, United States Circuit Judge for the Eighth Circuit, which, being entitled in said court and cause, is in words and figures following, to-wit:

Know All Men By These Presents that we, The Michigan Trust Company, a corporation, as principal, and Fidelity and Deposit Company, of Maryland, a corporation under the laws of Maryland as Surety, are held and firmly bound unto Edward P. Ferry, defendant above named, in the sum of Five Hundred Dollars, to be paid to the said Edward P. Ferry, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 22 day of May, 1909.

Whereas the above named plaintiff, The Michigan Trust Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment in the above entitled cause made and given by the Circuit Court of the United States for the District of Utah—

Now Therefore, the condition of this obligation is such that if the above named Michigan Trust Company shall prosecute said writ to effect and answer all costs and damages if it shall fail to 24 make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MICHIGAN TRUST COMPANY,
By E. B. CRITCHLOW,

Its Attorney and Counsel.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

By BARRY J. COLDING,

Attorney in Fact.

[SEAL.]

Attested and Sealed by
BENJAMIN WILLIAMS.

The above and foregoing approved as security upon writ of error herein, to operate as supersedeas.

WALTER H. SANBORN,
U. S. Circuit Judge.

May 31, 1909.

Filed May 31, 1909. Jerrold R. Letcher, Clerk.

Stipulation in re Writ of Error.

And afterwards and on the 4th day of June, 1909, stipulation in re writ of error was filed by plaintiff, which, being entitled in said court and cause, is in words and figures following, to-wit:

It is Stipulated that the Clerk shall return as the record upon writ of error in this cause the following:

Amended Complaint.

Demurrer to Amended Complaint.

Order sustaining Demurrer to Amended Complaint and denying Motion to amend.

- Motion to dismiss.
- Bill of Exceptions—Judgment—
- Petition for Writ of Error.
- Assignment of Errors.
- Bond on Writ of Error.
- Writ of Error.
- Citation.

HENDERSON, PIERCE, CRITCHLOW &
BARRETTE,

Attorneys for Plaintiff in Error.

RICHARDS, RICHARDS & FERRY,
VAN COTT, ALLISON & RITER,

Attorneys for Defendant in Error.

Dated June 3rd, 1909.

Filed June 4, 1909. Jerrold R. Letcher, Clerk.

25 In the Circuit Court of the United States for the District of Utah, Eighth Circuit.

1021.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff,
vs.
EDWARD P. FERRY, Defendant.

UNITED STATES OF AMERICA,
District of Utah, ss:

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the District of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of judgment of a plea which is in the said Circuit Court before you, between The Michigan Trust Company, a corporation, plaintiff in error, and Edward P. Ferry, defendant in error, a manifest error hath appeared, to the great damage of the said Michigan Trust Company, plaintiff in error, as by its complaint appears, we being willing that error if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf Do Command You if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this Writ, so that you may have the same at the City of St. Louis in the State of Missouri on the 1st day of July next in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 27th day of May, in the year of our Lord one thousand nine hundred and nine.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,

*Clerk of the United States Circuit Court for
the Eighth Circuit, District of Utah,
By MARGARET B. CONNELL,
Deputy Clerk.*

26

Allowed by:

WALTER H. SANBORN,
U. S. Circuit Judge.

Service of within Writ of Error and receipt of a copy thereof is hereby admitted this 3rd day of June, 1909.

JOSEPH T. RICHARDS,
WALDEMAR VAN COTT,
Attorneys for Defendant in Error.

UNITED STATES OF AMERICA,
District of Utah, ss:

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the United States Circuit Court for the District of Utah, this 23rd day of June, A. D. 1909.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER, *Clerk.*

The United States of America to Edward P. Ferry, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the District of Utah, wherein The Michigan Trust Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Michigan Trust Company as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this thirty-first day of May, in the year of our Lord one thousand nine hundred and nine.

WALTER H. SANBORN,
*Presiding Judge of the United States Circuit
Court of Appeals for the Eighth Circuit.*

27 Service of above citation admitted this 3d day of June, 1909.

JOSEPH T. RICHARDS,
WALDEMAR VAN COTT,
Attorneys for Edward P. Ferry, Defendant.

No. —. United States Circuit Court of Appeals. Eighth Circuit. The Michigan Trust Company, Plaintiff in Error, vs. Edward P. Ferry. Citation on Writ of Error.

UNITED STATES OF AMERICA,
District of Utah, etc.

I, Jerrold R. Letcher, Clerk of the United States Circuit Court for the District of Utah, do hereby certify that the foregoing pages numbered from one to 44 inclusive, are as full, true and complete a transcript of all the pleadings, proceedings and records now on file and of record in my office, in a certain cause heretofore adjudicated in said Court, wherein Michigan Trust Company, a corporation, was plaintiff and Edward P. Ferry was defendant, as it purports to contain, and made pursuant to the Stipulation filed herein by the plaintiff and entered into between the said parties.

I further certify that the original writ of error and citation are hereto attached and herewith returned with the transcript of the record in said cause.

In Testimony Whereof, I affix my official signature and the seal of said Court, at Salt Lake City, in said district, this 23rd day of June, A. D. 1909, and of the Independence of the United States of America the 123rd year.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER, Clerk.

Filed Jun. 28, 1909. John D. Jordan, Clerk.

28 *(Clerk's Certificate to Printed Record.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record in the case of The Michigan Trust Company, a Corporation, Plaintiff in Error, vs. Edward P. Ferry, No. 3107, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in said Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirteenth day of December, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

29 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1909, of said Court, before the Honorable Walter H. Sanborn and the Honorable Willis Van Devanter, Circuit Judges, and the Honorable William H. Munger, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the twenty-eighth day of June, A. D. 1909, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the District of Utah, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Michigan Trust Company, a Corporation, was Plaintiff in Error, and Edward P. Ferry was Defendant in Error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 3107.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

30 (Appearance of Counsel for Plaintiff in Error.)

On the second day of July, A. D. 1909, the appearance of counsel for plaintiff in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3107.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY.

The Clerk will enter *my* appearance as Counsel for the Plaintiff in Error.

HENRY C. HALL,
Colorado Springs, Colo.
EDWARD B. CRITCHLOW,
Salt Lake City.
WILLIAM J. BARRETTE,
Salt Lake City.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3107. The Michigan Trust Company, a corporation, Plaintiff in Error, vs. Edward P. Ferry. Appearance. Filed Jul. 2, 1909. John D. Jordan, Clerk. Henry C. Hall, Edward B. Critchlow, William J. Barrette, Counsel for Plff in Error.

(Appearance of Mr. Joseph T. Richards as Counsel for Defendant in Error.)

And on the sixteenth day of July, A. D. 1909, the appearance of Mr. Joseph T. Richards, as counsel for the defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3107.

31 THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

JOSEPH T. RICHARDS.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3107. The Michigan Trust Company, a corporation, Plaintiff in Error, vs. Edward P. Ferry. Appearance. Filed Jul. 16, 1909. John D. Jordan, Clerk. Joseph T. Richards, Counsel for Deft in Error.

(Appearance of Messrs. Van Cott, Allison & Riter as Counsel for Defendant in Error.)

And on the seventeenth day of July, A. D. 1909, the appearance of Messrs. Van Cott, Allison & Riter, as counsel for the defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3107.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

WALDEMAR VAN COTT.
E. M. ALLISON, JR.
W. D. RITER.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3107. The Michigan Trust Company, a corporation, Plaintiff in Error, vs. Edward P. Ferry. Appearance. Filed Jul- 17, 1909. John D. Jordan, Clerk. Waldemar Van Cott, E. M. Allison, Jr., W. D. Riter, Counsel for Def't in Error.

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(Order of Submission.)

And on the twenty-first day of September, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1909.

No. 3107.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY.

In Error to the Circuit Court of the United States for the District of Utah.

TUESDAY, September 21, 1909.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Henry C. Hall for plaintiff in error, continued by Mr. Waldemar Van Cott and Mr. Joseph T. Richards for defendant in error and concluded by Mr. Edward B. Critchlow for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(Opinion.)

And on the tenth day of January, A. D. 1910, the opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

38 United States Circuit Court of Appeals, Eighth Circuit,
December Term, A. D. 1909.

No. 3107.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.

EDWARD P. FERRY, Defendant in Error.

In Error to the Circuit Court of the United States for the District
of Utah.

Mr. Henry C. Hall and Mr. Edward B. Critchlow (Mr. Dunbar F. Carpenter was with them on the brief), for plaintiff in error.

Mr. Waldemar Van Cott and Mr. Joseph T. Richards, for the
defendant in error.

Before Sanborn and Van Devanter, Circuit Judges, and William H.
Munger, District Judge.

Syllabus.

1. Probate Court of Michigan—No Jurisdiction of Personal Claim
for Devastavit—Facts—Conclusions.

In 1867 F was appointed executor of the will of his father by a probate court in Michigan. He qualified and filed two reports prior to 1871. He became a resident of Utah in 1878, and was adjudged incompetent and guardians of his person and estate were appointed by a Utah court in 1901. In 1903, the residuary distributees of his father's estate filed a petition in the Michigan court that he account for the unadministered assets of that estate and that the Trust Company be appointed administrator *de bonis non* in his place, and a notice of hearing of this petition was published as prescribed by the Michigan statutes and served on him in Utah. By a guardian *ad litem* and next friend and by attorneys employed by his general guardians by authority of the Utah court he appeared, defended and filed a cross-petition to the effect that he should not be required to account and that the administration should be closed. After evidence and hearing the Michigan court found that he had committed a *devastavit*, decreed that he was personally liable to the estate and that he should pay out of his individual property to the Trust Company, which it appointed administrator *de bonis non*, \$915,355.08. The Trust Company brought an action against F in Utah upon this decree.

34. Held: (1) The probate court in Michigan had jurisdiction to settle the account of the assets of the estate between F, the executor and the estate and to order him to turn them over to a *suecessory administrator*.

(2) It had no jurisdiction to adjudicate the claim against him

personally and against his individual property for his *devastavit*, or to order the amount so adjudged due on account of that claim paid to the Trust Company as administrator *de bonis non* or otherwise.

2. Due Process—Substituted Service—Acceptance of Privilege Conditioned by Estops from Denying Sufficiency.

One who accepts an office, a right, or a privilege bestowed by virtue of the statutes of a state which provide that the courts of that state may acquire jurisdiction to determine specified controversies between him and others by means of a published notice of hearing thereof consents to the service of notice thereof in that way and is estopped from denying its sufficiency.

3. Probate Court—*Devastavit*—No Jurisdiction of a Personal Claim for.

A proceeding for the administration of an estate is a proceeding in *rem*.

A claim of residuary legatees and devisees against the person and the individual property of one who has been an executor or administrator of an estate founded upon his conversion and mal-administration of the assets thereof, is a claim in *personam* and it is not within the scope of the jurisdiction of a probate court in Michigan in a proceeding for the administration of an estate.

4. Probate Court—*Devastavit*—No Jurisdiction to Decree Payment for to Administrator *de Bonis Non*.

An administrator *de bonis non* takes the unadministered assets of an estate only, and those which do not remain in specie but have been changed in form, mixed with those of the former executor or converted to the latter's use, are administered assets.

A claim against the person or the individual property of an administrator or executor for debt or damages on account of his conversion or maladministration of the assets of the estate is the property of the creditors and distributees thereof and not of an administrator *de bonis non*, and a probate court has no jurisdiction to decree its payment to such a *successory administrator*.

5. Jurisdiction—Portion of Decree in Excess of, Void.

That portion of an order, judgment, or decree of a court, which has jurisdiction of a subject-matter and of the parties to it, which is in excess of its jurisdiction is as futile as a decree without any jurisdiction.

35 6. Due Process—Personal Service or Appearance Requisite in Personal Actions.

Personal service of notice within the jurisdiction of the court, or a voluntary appearance, or a consent to substituted service, is indispensable to the jurisdiction of a court to adjudicate a claim which is merely personal or which charges property of the defendant beyond the territorial jurisdiction of the court.

7. Due Process—Notice Must Warn of Claim and of Relief Sought.

The notice which will constitute due process of law must be such that the defendant may be advised from it of the nature of the claim against him and of the relief sought from the court if the claim is sustained.

8. Due Process—Question for Federal Courts—Not Answered by State Law and Practice.

State laws and decisions cannot determine for the national courts what constitutes sufficient process of law, sufficient notice of process or sufficient appearance of parties, but it is their duty to exercise their independent judgment in deciding these questions notwithstanding the full faith and credit provisions of the Constitution.

9. Due Process—Insufficient Notice.

Notice of a hearing before a probate court of a petition for the settlement of an account of an executor for his removal and the appointment of an administrator ad litem can be due process of law to enter a decree against the person and the property of the individual served to the effect that he pay out of his own property \$915,255.08 to the necessary administrator on account of his conversion and misadministration of the assets of the estate.

10. Guardian ad Litem—Previous Jurisdiction of Ward Indispensable to his Authority and to Power of Court to Appoint Him.

No court has jurisdiction to appoint a guardian ad litem to defend, and no guardian ad litem has authority to defend, or to submit to any court, or to appear in the litigation over any claim or controversy of which that court had not previously acquired jurisdiction by service of due process upon the ward.

11. General Guardians—No Authority to Charge Estate or Person of Ward by Appearing in Other Jurisdictions.

Neither the general guardians of the person and estate of a ward, nor the court which appoints them, have any power to charge the person or the property of their ward within the territorial jurisdiction of that court by defending in or submitting to any court within another jurisdiction or by appearing therein in any litigation over any claim of which the latter court had not otherwise acquired jurisdiction.

26. SAXON, Circuit Judge, delivered the opinion of the court.

The Michigan Trust Company, a corporation of the state of Michigan, brought this action in the Circuit Court of the District of Utah to recover \$915,255.08 from Edward P. Ferry, a citizen of this district. The Circuit Court sustained a demurrer to the plaintiff's complaint and denied a motion to amend it and these rulings are assigned as error. The material facts set forth in the complaint and the proposed amendment are these: In the year 1887 the defendant, Edward P. Ferry, who was then a citizen of

Michigan, was appointed executor of the will of his deceased father, William M. Ferry, by the Probate Court of the County of Ottawa, in the State of Michigan. He qualified as such executor, entered upon the discharge of the duties of his office, filed two annual accounts, one in March, 1869, and another in March, 1870, and took possession and disposed of a large amount of property of the estate.

In 1878, he removed from Michigan and became a resident and citizen of Utah. On February 12, 1893, he was adjudged to be an incompetent person by the district court of the third judicial district of the State of Utah, his sons, W. Mont Ferry and Edward S. Ferry, citizens of Utah, were by that court appointed guardians of his person and of his estate and have since acted as such.

On June 26, 1893, residuary legatees and devisees under the will of William M. Ferry filed in the probate court in Michigan their petition wherein they prayed that Edward P. Ferry should be removed as executor of his father's will, "that he or his representatives be ordered to account forthwith to said court for the residue of said estate of said deceased which was unadministered, for the appointment of the Michigan Trust Company, plaintiff herein, or some other suitable person, as administrator ad bonis non with the will annexed of said estate, and that such probate court make such other and further order in the premises as to it might seem proper." Thereupon the probate court made an order that the petition should be heard on July 21, 1893, caused a notice of the petition and of the time and place of the hearing thereon to be published in a newspaper as required by the statutes of Michigan, a copy of the order was served on Edward P. Ferry and upon his guardians in the State of Utah, the District Court of Utah ordered that the guardians of the estate of Edward P. Ferry be permitted to defend against the claim of this petition and those guardians retained attorneys who undertook such a defense and were paid by the District Court out of the estate of Edward P. Ferry in Utah. On motion of these attorneys the probate court of Ottawa County appointed one of them guardian ad litem and next friend of Edward P. Ferry, and he filed an answer to the petition of the legatees and devisees and a cross-petition wherein he alleged that Edward P. Ferry had fully administered and accounted for the estate of his father and prayed that he be discharged as executor. An answer to this cross-petition was filed, there was a hearing upon

the issues presented by these pleadings and thereafter the 37 Michigan probate court found that the estate of William M.

Ferry had not been fully administered, that Edward P. Ferry was not entitled to an order closing it, that it was his duty to render a true account of his doings as executor, that he had failed to do so, that the probate court had been compelled to and had made such an account, that there were errors, mistakes and fraud in the rendition of the two annual accounts made by Edward P. Ferry as executor in 1869 and 1870, which the court had corrected, that large amounts of money and property of the estate of his father had come to the hands of Edward P. Ferry as executor which he had misap-

propriated and converted to his individual use, that Edward P. Ferry, executor, is indebted to the estate of Rev. William M. Ferry, deceased, at this date, upon balance of account, in the full and true sum of One Million Two Hundred and Twenty Thousand Four Hundred and Seventy-three and 44/100 Dollars (\$1,220,473.44); and that said sum of money is now justly due and owing by said Edward P. Ferry to said estate, over and above all legal set-offs or counterclaims, and this court ordered and decreed that the prayer of the cross-petition be denied, that Edward P. Ferry be removed from his office of executor, that the Michigan Trust Company be appointed administrator de bonis non with the will annexed of the estate of William M. Ferry upon the filing of its acceptance of the trust, that as Edward P. Ferry is himself a residuary legatee of one-fourth of the residue of the estate of his father he should not be required to pay over that portion of the amount due from him as executor to the estate, but that "the remainder of the indebtedness owing by said Edward P. Ferry, said executor to the estate of said William M. Ferry, deceased, is the sum of Nine Hundred and Fifteen Thousand Three Hundred and Fifty-five and 08/100 Dollars (\$915,355.08), and it is further ordered, adjudged and decreed that said Edward P. Ferry is individually liable therefor to the estate of William M. Ferry, deceased, and that, within sixty days from this date, said Edward P. Ferry, said executor do pay the sum of Nine Hundred and Fifteen Thousand Three Hundred and Fifty-five and 08/100 Dollars (\$915,355.08) to the Michigan Trust Company, administrator de bonis non with the will annexed of the estate of said William M. Ferry, deceased, together with interest on said sum from this date until paid at the rate of five (5%) per cent per annum". After this order and decree was made the guardian ad litem and next friend of Edward P. Ferry tried to take an appeal therefrom but did not succeed.

Has a probate court which lawfully appoints one executor of an estate, jurisdiction upon substituted service of notice upon him in another jurisdiction to adjudicate his individual liability for the taking of property of the estate from himself as executor and the conversion of it to his own personal benefit? If so, has such a court jurisdiction to determine and fix this individual liability without notice to him that such an adjudication would be sought and if warranted by the proof might be rendered?

28. The cause of action set forth in the complaint rests upon the decree of the Probate Court of Ottawa County that Ferry the individual is liable for a fixed amount of damages for his taking from himself as executor and his conversion to his own use of property of the estate which came to his hands as executor. If that court has jurisdiction to render that adjudication the complaint stated a good cause of action, if it did not have that jurisdiction the demurrer was rightly sustained.

If another person had been the executor and Ferry had taken from him in Michigan property of the estate of his father, had converted it to his own use and then left the state there could

have been no doubt that no court in Michigan could have acquired jurisdiction to determine his liability therefor by the publication of any summons or notice, or by the service of any notice upon him beyond the boundary of the state. Personal service upon him within the jurisdiction of the court, within the State of Michigan, or his voluntary appearance would have been indispensable to the acquisition of jurisdiction to determine his liability.

The statutes of Michigan require any executor before he enters upon the execution of his trust to give bond to the Judge of Probate in such sum as he may direct to administer according to law and to the will of the testator all his goods, chattels, rights, credits and estate which shall at any time come to his possession, but no court of Michigan could have acquired jurisdiction to adjudicate the liability of an obligor on such a bond upon substituted service when he was beyond the jurisdiction of the court. The laws of a state have no extra-territorial force; no tribunal established by it can extend its process beyond the bounds of the state so as to subject either persons or their property to its decisions without their consent. Whenever a judicial proceeding involves the adjudication of the personal liability merely or of the liability of the property of the defendant without the state he must be brought within the jurisdiction of the court by service of process upon him within the state or by his voluntary appearance. *Pennoyer v. Neff*, 95 U. S. 714, 722, 723, 727, 732, 733; *D'Arcy v. Ketchum*, 11 How. 165, *174, *176; *Galpin v. Page*, 18 Wall. 350, 367, 368, 369; *Insurance Company v. Bangs*, 103 U. S. 435, 439, 440; *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 8, 17-21; *Brown v. Fletcher's Estate*, 210 U. S. 82, 90, 91, 92.

How then can the judgment of the probate court in this case be sustained? Counsel for the plaintiff answer on the ground that Ferry accepted the appointment of executor and thereby submitted himself to the power of the Michigan court and his departure from the state failed to deprive that court of jurisdiction over him. To the extent that his acceptance of his office and the notice of hearing which was published extended the jurisdiction of that court over him this answer seems to be sound. The statutes of Michigan granted power to this probate court to notify and require every executor and administrator appointed by it to

39 render to it an account of all moneys and other property of the estate he was administering in his hands as such executor or administrator and of the proceeds and expenditures thereof. Compiled Laws of Michigan, Sec. 9345; to give this notice by publication, Secs. 688, 9346; to remove the executor or administrator if he failed to render to the judge of probate a satisfactory statement of his accounts, Sec. 9347; and to cause the bond of the executor or administrator to be prosecuted whenever he should refuse or omit to perform the order or decree of the court for the rendition of an account or upon a final settlement or for payment of debts, legacies or distributive shares, Sec. 9491. Those statutes also provided that in such a case the writ should run in the name of the judge

of probate, Sec. 9492; that if judgment should be rendered execution should be awarded for the value of all the estate of the deceased which should have come to the hands of the executor or administrator for which he should not have accounted "and for all such damages as shall have been occasioned by his neglect or mal-administration", Sec. 9495; that all moneys received on any such execution should be paid to the rightful executor or administrator and should be assets in his hands to be administered according to law, Sec. 9496; and that when an executor or administrator, after being duly cited by the probate court should neglect to render his account, he should be liable on his bonds for all damages which might accrue and his bond might be put in suit by any person interested in the estate, Sec. 9439. The petition of the residuary legatees and the notice of hearing thereon which was published pursuant to the statutes gave the defendant ample warning that the question whether or not he should be removed as executor, whether or not he should be ordered to account for the residue of the estate of his father unadministered, and whether or not the Trust Company should be appointed administrator *de bonis non* in his place, would be considered and might be decided by the court at the hearing. When the office of executor was tendered to him by that court the statutes of Michigan provided that, if he accepted that office, that court might acquire jurisdiction to determine all these issues between him and the legatees of his father's estate upon a service of a notice of the time and place of hearing upon him by publication. That office was tendered to him on the condition imposed by these statutes that the probate court should have the power to call him before it and to adjudicate these issues for or against him without other warning than a notice published in a newspaper, and he necessarily accepted that condition when he accepted his office. That condition was not limited to instances in which one or more of these issues should arise while he was in the State of Michigan, but it included all cases in which one or more of these issues should arise while he was executor and was as effective after as before his departure from the state. One who accepts an office, a right, or a privilege bestowed by virtue of the statutes of a state which provide that the courts of that state may acquire jurisdiction to determine specified controversies between him and others by means of a published notice of hearing thereof, consents to the service of notice in that way and is

40 estopped from denying its sufficiency. By the defendant's acceptance of the office of executor from the Michigan probate court and by that court's published notice of the time and place of its hearing that court acquired plenary jurisdiction to adjudicate whether or not he should be removed as executor, whether or not he should account for the administered assets of his father's estate, the true state of that account, and whether or not the Trust Company should be appointed administrator *de bonis non*, and its determination of these issues was conclusive. *Spencer v. Houghton*, 68 Calif. 82, 88, 89; *Trumpler v. Cotton*, 109 Calif. 250, 254, 255; *Moore v.*

Fields, 42 Pa. St. 467, 473; Martin v. Martin, 214 Pa. St. 389, 394; Usry v. Usry, 8 S. E. (Ga.) 60, 61; Stevens v. Kirby, 121 N. W. (Mich.) 477, 480.

It is one thing, however, to adjudge the true state of the account of the assets of an estate in the hands of an executor and to require him to pay or deliver them to his successor and a very different thing to adjudge that the person who holds the office of executor has taken assets of the estate from himself as executor, has committed a *devastavit* and is personally liable in damages therefor in a specific amount and to require him to pay that amount out of his individual property. The former is a determination of the true state of the account of the assets of the estate between the executor and the estate, the latter is the adjudication of the liability of a person and of his individual property for a tort, or if the tort be waived, for a debt. The former was within the scope of the jurisdiction of the Michigan probate court because it was a determination, after due notice of its proposed action, of the state of the *res* that was the subject of the proceeding before it, the latter was the adjudication of a challenged cause of action in *personam* at common law.

A proceeding in a probate court to administer upon the estate of a deceased person is a proceeding in *rem* and not in *personam*. The property of the estate within the jurisdiction of the court is the defendant, the executor or administrator is its representative, all claiming any interest in that property under the deceased are parties to the proceeding, Grignon's Lessee v. Astor, 2 How. 319, 337; Sheldon's Lessee v. Newton, 3 Ohio St. 494, 503; Wilson v. Hartford Fire Ins. Co., 90 C. C. A. 593, 595, 164 Fed. 817, 819, and the only finding and decree which the Michigan probate court was empowered to make and that which it should have made in the case before it was an adjudication of the amount of the assets of the estate of the deceased that were in the hands of the executor Ferry or unaccounted for by him and an order that he pay or deliver them over to his successor in interest. The limit of its power was such an order and a proceeding for contempt for its disobedience, which would have been futile because the person of the defendant Ferry in Utah was beyond reach of the process of the Michigan court.

The decree that court rendered, however, was that Ferry, the individual, was personally liable for a *devastavit* in the sum of \$915,355.08, more than half of which was interest, and that he should pay this amount out of his individual property to the administrator *de bonis non* of the estate of his father. The Surrogate Court in the State of New York and the Orphans' Court in the State of New Jersey were authorized by statutes of those states to exercise the powers of courts of chancery over guardians, administrators and executors and to issue executions to enforce their decrees which by virtue of those statutes created the same liens and priorities as the judgments of other courts, and the cases of Pyatt v. Pyatt (N. J.) 18 Atl. 1048, 1049, and Seaman v. Duryea, 11 N. Y. 324, 329, which are cited and much relied upon by counsel for the

complainant, arose under those statutes. They are not, however, authoritative in the case under discussion for the orders and decrees of probate courts in Michigan create no liens and may not be enforced by execution. The only way in which those courts are authorized to compel obedience to their orders or decrees is by imprisonment for contempt and the fact that such a proceeding would be futile to compel obedience to an order that one should pay \$900,000.00 out of his individual property, since a commitment under such an order would constitute imprisonment for debt, and that the proceeding for contempt is only available to compel the payment or delivery of assets of the estate held by one in trust for the distributees is very persuasive that the decree of the probate court in this case was unwarranted. "It is true" said the Supreme Court of Michigan, "that probate courts are 'courts of record,' being declared to be such by the constitution, but they are not 'courts of law' according to the ordinary use of that term. They derive their origin and their jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system. Parties cannot litigate questions of fact in them, except in the instance of probate of wills, or when the power of appointment is to be exercised." *Holbrook v. Cook*, 5 Mich. 225, 228. "The jurisdiction over contentious litigation belongs, under the constitution, to courts of law and equity." *Detroit, L. & N. R. Co. v. Probate Judge*, 63 Mich. 676, 30 N. W. 598; *Ferris v. Higley*, 20 Wall. 375. And the hearing and adjudication of the cause of action in personam against Ferry for the damages caused by his waste and conversion of the assets of the estate of his father was not within the scope of the jurisdiction of the probate court of Michigan.

Again, that court adjudged on the petition of residuary legatees and devisees of the estate of William M. Ferry that the defendant was individually liable to the estate for a devastavit in the sum of \$915,355.08, and that he should pay this amount to the administrator de bonis non, the Trust Company. But at common law an administrator de bonis non takes the goods, chattels and credits of the deceased which have not been administered only and all his property which has been mixed with that of the former executor or administrator, or which has been converted to his individual

use, or into another form, in short all property of the deceased which does not remain in specie is administered and not unadministered property. The former executor is liable to creditors, legatees and distributees only for his conversion and waste of the assets of the estate and they may maintain suits against him therefor. He is not accountable to an administrator de bonis non for such mal-administration or for anything except the goods and personal property of the deceased in his hands in specie, and no court has jurisdiction to render decrees or orders against him for damages for delinquencies or devastavits in favor of a successor administrator unless expressly authorized to do so by the statute under which it acts. *Beall v. New Mexico*, 16 Wall. 535, 541; *United States v. Walker*, 109 U. S. 258, 260; *Hanifan v. Needles*,

108 Ill. 403, 407, 408; *State v. Fidelity & Deposit Co.*, 100 Md. 256, 59 Atl. 735, 736; *Carrick's Administrator v. Carrick's Executor*, 23 N. J. Equity 364, 366; *Donalson v. Lucas*, 19 N. E. 758, 760; *Potts v. Smith*, 3 Rawle 361; *Rowan v. Kirkpatrick*, 14 Ill. 1, 8; *Newall v. Turney*, 14 Ill. 338; *Marsh v. People*, 15 Ill. 284, 286; *Coleman v. McMurdo*, 5 Randolph 51; *Bank of Penn. v. Haldeman*, 1 Penrose & Watts, 161; *Bell v. Speight*, 11 Humph. 451; *Swink v. Snodgrass*, 17 Ala. 653; *Slaughter v. Fronau*, 5 T. B. Mon. 19; *Gamble v. Hamilton*, 7 Mo. 469. This was established and familiar law when the Michigan statutes were enacted but they granted no authority to an administrator *de bonis non* to recover from a former executor or administrator debt or damages for his conversions or delinquencies and gave no jurisdiction to the probate courts of that state to decree or order the payment of such debts or damages to him. The statutes of Illinois expressly provided that a successor administrator might maintain any appropriate action or proceeding against a removed executor or administrator for any waste, mismanagement of, or breach of duty with respect to, the estate, occurring during the latter's administration, Revised Statutes Illinois, 1874, Chap. 3, Sec. 39, and the Supreme Court of that State held that in the absence of such a statute an administrator *de bonis non* could not, while under it he might, sustain such an action. *Hanifan v. Needles*, 108 Ill. 403, 407, 408. No such provision has been discovered in the statutes of Michigan. On the other hand they leave the causes of action against an executor or administrator where the common law placed them, in the hands of the creditors, legatees and distributees of the estate. They limit by express terms the power of the probate courts of that state on the death or removal of a former executor or administrator to the grant of letters of administration "of the estate not already administered," Secs. 9318, 9332, and they provide one way only whereby the probate court may ever acquire any jurisdiction or control whatever over the debts or damages or the claims therefor caused by the neglect or mal-administration of an executor or administrator, and that method is by means of a plenary suit in another court upon his bond, brought, not by the administrator *de bonis non*, but by the judge of probate, Sec. 9491. And they provide one way and one way only whereby the administrator *de bonis non* may ever acquire the control or possession of any of these debts or damages, and that is a method whereby he may acquire the proceeds thereof only after they have been collected by means of an execution issued on a judgment in an action brought by the probate judge in another court and a subsequent payment of the amount thus recovered to the administrator *de bonis non* under section 9496. *Expressio unius est exclusio alterius*. The prescription of this single exception to the common law rule upon this subject excludes all others and the conclusion that the Michigan probate court had no jurisdiction on the accounting to render any decree or order that the defendant Ferry should pay and the administrator *de bonis non* should recover from him the debt or damage

resulting from his conversions, neglects and mal-administration, is logical and irresistible.

Counsel say, however, in answer to this proposition that where an administrator or an administrator *de bonis non* has recovered a judgment in one state he may maintain an action upon it in his own name in another jurisdiction and his title will be treated as surplusage, and this is true where the court which rendered the judgment had jurisdiction so to do. *Talmage v. Chapel*, 16 Mass. 71; *Lewis v. Adams*, 70 Calif. 403, 11 Pac. 833; 2 Black on Judgments, Sec. 922. But no summons or notice was ever served on the defendant warning him that any claim that the Trust Company as administrator *de bonis non* or otherwise was entitled to recover damages for his mal-administration of the estate of his father, would be considered or adjudicated by the probate court in Michigan, no cause of action on behalf of any such administrator was pleaded or suggested in the petition to which his attention was called, the findings and decree of the probate court are that the defendant's indebtedness therefor is to the estate of the father while the order of the probate court that this debt be paid to the Trust Company rests upon no cause of action pleaded and hence it was beyond the jurisdiction of that court and void. *United States v. Walker*, 109 U. S. 258, 285, 287. That portion of an order, judgment or decree of a court that has jurisdiction of the subject-matter and the parties to a controversy which is in excess of that jurisdiction is as futile as an entire decree without any jurisdiction. *Ex parte Lange*, 18 Wall. 163; *Bigelow v. Forrest*, 9 Wall. 339; *Day v. Micon*, 18 Wall. 156; *Foltz v. St. Louis & S. F. Ry. Co.*, 8 C. C. A. 635, 639, 60 Fed. 216, 320.

Nor is this all. The effect of the adjudication of the probate court of Michigan if authorized must be to deprive the defendant of property worth more than \$900,000.00 situated in the State of Utah, if he has that much property there. The fifth amendment to the Constitution of the United States forbids such a deprivation without due process of law. What constitutes due process of law is a question which it is the duty of the national courts to exercise their independent judgment to decide when it is properly presented for their decision, notwithstanding the requirement of the constitution that full faith and credit shall be given in each state

to the public acts, records and judicial proceedings of every 44 other state. State laws and decisions may not determine for the federal courts what shall be deemed sufficient process of law, sufficient service of process or sufficient appearance of parties. *Insurance Company v. Bangs*, 103 U. S. 435, 439; *D'Arcy v. Ketcham*, 11 How. 165, 178; *Pennoyer v. Neff*, 95 U. S. 714, 722, 723.

Due process of law must give to the defendant "notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained." *In re Rosser*, 41 C. C. A. 497, 502, 101 Fed.

562, 567; *In re Wood and Henderson*, 210 U. S. 246, 254. The nature of the claim against the defendant which the Michigan probate court sustained and decreed was a claim against his person and his individual property for the waste and conversion of property of the estate of his father, and the relief sought from that court if the claim was sustained was that he should be adjudged to be personally liable for and should pay out of his individual property more than \$900,000.00 to his successor in the administration of his father's estate. But there was no notice of warning of any such claim or that any such relief would be sought if the petitioner's prayer was granted, either in the petition on which this claim was adjudged or in the notice thereof which was published and served upon the defendant. Petition and notice alike were limited to the issue whether or not the defendant should be removed as executor, whether or not he should be ordered to account for the unadministered assets of his father's estate, the true state of that account, and whether or not the Trust Company should be appointed administrator *de bonis non* in his place. The adjudication of these issues did not involve the determination of the defendant's personal liability for waste and mal-administration. The claim of that liability and the issue arising upon it were beyond the scope of the jurisdiction of the probate court in the proceeding before it which extended only to the administration and disposition of the assets of the estate of William M. Ferry, no notice that this claim and issue would be considered or adjudicated was given by the petition of the legatees or by the notice that was published and served upon the defendant, and that court never acquired any jurisdiction to determine them. *In re Rosser*, 41 C. C. A. 497, 505, 101 Fed. 562, 570; *Fenton v. Garlick*, 8 Johnson's Reports 195, 196; *Munroe v. The People*, 102 Ill. 406, 411, 412; *Hanifan v. Needles*, 108 Ill. 403, 410, 411. In the case last cited the statutes gave authority to the county court to require the executor to settle his accounts as executor and if he failed to do so to deal with him as for a contempt and to remove him. The court gave him notice to appear "and present his accounts of said estate for settlement as said executor," he failed to do so and the court removed him. The Supreme Court of Illinois held that the county court had no jurisdiction to make the order of removal and that it was void because no notice that the court would hear or consider the question of his removal was given to the executor. In *Monroe v. The People*, 102 Ill. 406, 411, 412, that court held that an order of the county court that the administrator be removed based on an order to show cause why the administratrix should not pay an allowed claim without notice of possible removal or revocation of her letters was "absolutely void for want of jurisdiction in the county court to act."

At the request of the trustee a referee in bankruptcy required *Rosser*, a bankrupt, to submit to an examination under Sub-division 9, Section 7 and Section 21 of the Bankrupt Act. He and other witnesses appeared and testified, the referee found that he had received and failed to account for or to schedule \$2,500.00 which was a part of his estate and without any further notice that such

an order was contemplated ordered him to pay it over to the trustee. Proceedings for contempt based upon this order and the failure of the bankrupt to comply with it were set aside by this court and the order was adjudged to be void because the bankrupt never had any notice of the presentation or hearing of the claim against him for this \$2500.00 until after the order for its payment was made. *In re Rosser*, 41 C. C. A. 497, 498, 504, 505, 101 Fed. 562, 563, 569, 570.

But perhaps the best illustration of the principle which governs this case is found in *Fenton, Administrator of Ramsdall v. Garlick, Trustee of Garlick*, 8 Johnson's Reports 195. The word trustee in this case is used in the sense of the word garnishee in similar proceedings in the western states. Ramsdall, who had obtained a judgment against Samuel Garlick, brought an action in a court of general jurisdiction in the State of Vermont against Seth Garlick, as trustee of Samuel, wherein he alleged that Seth had in his possession money and personal property of Samuel of the value of \$300.00. Seth appeared and testified and the court adjudged that he had moneys of Samuel in his possession of the value of \$300.00 and after the death of Ramsdall ordered that his administrator have execution for his debt, damages and costs against the goods and chattels of Samuel in the hands of Seth. Such an execution was issued and returned unsatisfied. Meanwhile Seth had departed from the State of Vermont and taken up his residence in the State of New York. Thereupon the Vermont court granted a rule upon him that he appear at the next term of that court and show cause why an execution should not issue upon the judgment, against him and his own proper goods, chattels and estate. The rule was served upon him in New York and the Vermont court thereupon adjudged that the plaintiff should recover of Seth Garlick the amount of the judgment against Samuel Garlick and should have execution against the goods, chattels and estate of Seth. After the rendition of this judgment an action was brought by the administrator of Ramsdall in one of the courts in the State of New York and the Supreme Court of that State said:

"This was an action of debt on a judgment obtained in Vermont against the defendant, as trustee of Samuel Garlick. The 46 judgment was in the nature of one founded on the suggestion of a *devastat^{at}* committed by the defendant, in the character of trustee, and against such a charge he was entitled to be heard. The mere fact of his having formerly had assets or moneys of Samuel Garlick in his hands, was not sufficient to authorize a judgment against his own property, in his individual capacity, until opportunity had been given to him to show in what manner he had disposed of those assets. This opportunity he has never had; for, at the time he was called upon to show cause, by a rule in the nature of a writ of *scire facias*, he resided in this state, and the service of that rule upon him, while within this state, (which fact was admitted,) was void, not only upon general principles, but by the express words of our statute, passed the 10th of August, 1798. (Sess. 22, c. 3.) The judgment consequent upon such a service cannot be

regarded by this court as the ground of a suit; nor will an action be sustained upon a judgment obtained in another state against an inhabitant of this state, without any personal summons or service of process. This was so decided in *Kilburn v. Woodworth*, (5 Johns. Rep. 37,) and in *Robinson v. Executors of Ward* (Ante, 86). The proceedings against the defendant, as trustee, in the year 1803, was not notice of any proceeding upon which this judgment was obtained, any more than a proceeding, in the first instance, against an executor or administrator, would be sufficient to warrant a judgment founded on a *devastavit*. The original suit, in both cases, is rather a proceeding *in rem*, than *in personam*. It is against the assets in the hands of the executor or trustee, belonging to the party whom they represent, and there must be a new suit, or a notice which is equivalent to it, before the trustee can be charged in his own private property or person, as for a breach of trust. There was no such new suit or notice to warrant the judgment in this case; and consequently, no action can be sustained upon it in this state. Agreeably to the stipulation of the parties, a judgment of *nonsuit* must be entered."

Because no notice of the nature of the claim against Ferry to the effect that he and his individual estate were liable for debts and damages on account of his waste and conversion of the assets of the estate of his father, or of the relief that was sought and obtained from the probate court of Michigan upon this claim was legally given to the defendant Ferry before the decree thereon was rendered, because the proceeding in that court was *in rem* and the adjudication of this personal claim for debt or damages was beyond the scope of the jurisdiction of that court in that proceeding and because that court was without power to adjudge in that proceeding that the Trust Company as administrator *de bonis non* or personally should recover that debt or those damages, the order and decree of that court that the defendant was individually liable for and should pay to the Michigan Trust Company, administrator *de bonis non* of the estate of William M. Terry, on account of the *devastavit* found \$915,355.08, was beyond its jurisdiction and void and an action upon it cannot be sustained in any other jurisdiction.

47 This conclusion has not been reached without consideration of the remarks of Mr. Woerner in Section 534, et seq. of his *American Law of Administration* and the opinions of the courts in *Pyatt v. Pyatt*, 18 (N. J.) Atl. 1048, 1049; *Seaman v. Duryea*, 11 N. Y. 324, 329; *Storer v. Freeman*, 6 Mass. 435, 439; *In re Estate of Wineox*, 85 Ill. App. 613; *Salomon v. The People*, 89 Ill. App. 374; *Lett v. Emmett*, 37 N. J. Equity 535; *Gray v. Gray*, 39 N. J. Equity 332, and other cases, in some of which damages for *devastavits* were considered and allowed in accountings in probate courts. But the question presented in this case does not appear to have been carefully considered and authoritatively ruled under statutes and facts similar to those in the case in hand in any of these decisions, and so far as the opinions and practice in these

and other cases are inconsistent with the conclusions which have been reached they fail to commend themselves to our judgment.

The argument of counsel for the plaintiffs that the guardian ad litem and next friend of the defendant appointed by the Michigan court and the attorneys employed with the approval of the Utah court by the general guardians of his person and of his estate in Utah by their appearance, their defense of the claims against Ferry and the presentation of the cross-petition in the Michigan court waived all objections to its jurisdiction and estopped the defendant from questioning it, has not been overlooked.

But the appearance of attorneys, guardians and next friends of a person, or even his own appearance in a court, to defend or prosecute a claim of which that court has jurisdiction, does not and cannot estop him from subsequently challenging the jurisdiction of that court to render a decree in that proceeding to which he never assented upon a claim of which that court never acquired any jurisdiction.

Moreover the probate court of Michigan had no jurisdiction to appoint a guardian ad litem to defend, and the guardian ad litem it appointed had no authority to appear, to defend, or to submit to that court any claim of which that court had not previously acquired jurisdiction by lawful service of due process of law upon the defendant, Galpin v. Page, 18 Wall. 350, 365, 373; Insurance Company v. Bangs, 103 U. S. 435, 440, and no service of such process as gave that court any jurisdiction of the claim against his person and estate founded on the alleged *devastavit* had ever been made.

For the same reason the general guardians, the court in Utah and the attorneys they employed were without power to bind the person or to charge the estate of Ferry in Utah with this claim by their appearance in the Michigan court. The limit of their jurisdiction was over the person and property of the defendant in Utah and it was beyond their power to bind the former or to charge the latter by any appearance for them in or submission to a court which acquired no jurisdiction thereof, of any claim against either.

They could not by their action in Michigan subject the person of their ward and client in Utah to arrest and imprisonment on the process of the Michigan court or his estate in Utah to decrees by that court upon claims of which it had not otherwise acquired jurisdiction, Brown v. Fletcher's Estate, 210 U. S. 82, 91; Insurance Company v. Bangs, 103 U. S. 435, and the presentation by the next friend of the defendant of his claim that the powers of attorney and agreements of the residuary legatees presented a good cause why he should not render any account and entitled him to a decree closing the estate without such an account, constituted no appearance in the litigation over the claim for the *devastavit* and no waiver of the defendant's right to maintain that the probate court of Michigan never acquired jurisdiction thereof. The decree of the court below was right, it must be affirmed, and it is so ordered.

49

(Judgment.)

And on the tenth day of January, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909, Monday, January 10, 1910.

No. 3107.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY.

In Error to the Circuit Court of the United States for the District of Utah.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Utah, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that Edward P. Ferry have and recover against The Michigan Trust Company the sum of twenty dollars for his costs herein and have execution therefor.

January 10, 1910.

(Petition for a Rehearing.)

And on the tenth day of March, A. D. 1910, a petition of plaintiff in error for a rehearing was filed in said cause, in the words and figures following, to-wit:

50 United States Circuit Court of Appeals, Eighth Circuit.

No. 3107.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Utah.

Petition for Rehearing.

Now comes the Plaintiff in Error and prays for a rehearing by this Honorable Court of the Writ of Error herein argued September 1909, on the grounds following, to-wit:

I.

Under the practice in Michigan, the jurisdiction of the probate court extends to accounting for all assets which have, at any time, come into the hands of the executor, and to a statement and settlement of his account for all such assets.

II.

The notice or substituted process served upon the defendant herein embraced an accounting for all of such assets. The petition and notice were ample for exercise of that jurisdiction and should not be confined to assets "unadministered" in the sense attached to that word by this Court.

51

III.

The petition filed in the probate court did not contain the qualifying words "which was unadministered." The order made and published appointing a date for hearing thereon recited said petition as praying:

"that Edward P. Ferry be removed as executor of the will of said deceased by an order of this court, and that he or his representatives be ordered to account forthwith to this court, for the estate of said deceased down to the date of said accounting, and that the administration of said deceased be granted unto the Michigan Trust Company as administrator de bonis non with the will annexed, or to some other suitable person."

This was the notice which Edward P. Ferry received and to which he responded by appearance in probate court.

That court had power to cite him in like manner in its own motion.

The qualifying words above quoted were first used in the amended complaint below and were there used in the sense attached to them by the Supreme Court of Michigan.

IV.

The conclusions stated by this Court in its opinion (page 8 thereof) should not therefore be limited to assets "unadministered" as the word is there defined. The word "administered" as used in Michigan statutes and jurisprudence has been construed and applied by the Supreme Court of that State, (Lafferty vs. Bank, 76

52 Mich. 35, 50), and such construction must govern all the courts, state and federal, under the full faith and credit clause of the constitution.

The distinction established by this Court between probate court jurisdiction of subject matter and person to remove the executor, require accounting for unadministered assets, establish the true state of his account and appoint a successor administrator, which this Court sustains, and jurisdiction to adjudicate his liability to the estate and to compel payment by the executor individually of

the balance found due, which it denies, was not argued at all, or briefed except very indirectly, and plaintiff desires opportunity to discuss it.

V.

It appears from the decree itself that the executor was also cited to examination of his final account preparatory to statement and settlement thereof, and the notice of such examination of his final account was duly served in the statutory manner, with like effect as the original notice theretofore served. He was bound by that notice as fully as by the original notice.

VI.

The notice served upon Edward P. Ferry calling him to "account for the estate down to the date of the accounting" was in effect a notice calling upon him to liquidate his account.

VII.

In so far as the probate court had exercised jurisdiction over the executor, he was properly and fully represented by counsel of record, guardian ad litem and next friend, and service of orders upon them in progress of the litigation was binding upon him as upon any other litigant.

53

VIII.

The probate court proceeding was not in the nature of a personal action based on alleged *devastavit*. It was an accounting analogous to that usual in chancery, and in a court clothed with chancery powers sufficient to sustain its decree. The outcome of the accounting was to strike a balance against the official required to account, to adjudge his liability for that balance and to decree its payment.

A proceeding for probate of a will or administration of an estate is quasi in rem. An action or proceeding against an executor or administrator upon a cause of action arising against decedent before decedent is also quasi in rem.

A proceeding against an executor for his removal and that he account, is quasi in personam, in that the individual and not the estate must respond; even though the proceeding be regarded as quasi in rem, in that (a) the res, the estate, is still the object of solicitude and protection by the probate court, and (b) the liability of the executor is limited to the value of the estate which has come into his hands, nevertheless the proceeding is by or for the estate against the executor. Such actions or proceedings are statutory and merely resemble those in rem or in personam, properly so called.

IX.

The probate courts in Michigan have jurisdiction under their practice to charge an executor in his accounts with assets lacking

through waste and to make a final order or decree charging him with the balance found due the estate.

X.

54 Under the probate practice in Michigan the decree properly directed payment of the balance found due, with lawful interest, to the persons entitled thereto.

XL.

Under the probate practice in Michigan the decree was properly rendered against Edward P. Ferry individually.

XII.

Under the probate practice in Michigan the decree was properly in favor of the administrator *de bonis non*; moreover, in this case all parties interested were in court and acquiesced in the decree directing payment to the plaintiff—in effect an assignment in trust to the plaintiff of their rights.

XIII.

This Court has failed to give to the Michigan probate decree the full faith and credit which it has in Michigan and to which it is entitled in Utah and in every other jurisdiction under the constitution of the United States.

XIV.

This Court has failed to follow the constitution and statutes of the State of Michigan and the construction placed thereon by the decisions of the Michigan courts.

XV.

55 This Court should take cognizance of the fact that the notice served upon Edward P. Ferry called him to account for the estate of the deceased and, in legal effect to liquidate the same. This construction should be placed upon the notice, thereby constituting the same due process of law to support the decree.

XVI.

This Court should take cognizance of the fact that under the probate practice of Michigan the notice calling Edward P. Ferry to account was, in its scope, an order to account not merely for "unadministered assets" but for the estate, and, as such, constituted due process of law to support the decree.

XVII.

The decision of this Court should clearly indicate what portions,

if any, of the Michigan Probate decree are conclusive, in this Court and everywhere, and what portions, if any, are invalid.

Respectfully submitted,

CHARLES S. THOMAS,

HENRY C. HALL,

Attorneys for Petitioner, Plaintiff in Error.

EDWARD B. CRITCHLOW,

WILLARD F. KEENEY,

WALTER L. LILLIE,

Of Counsel.

We hereby certify that the foregoing petition is, in our opinion, well founded, and is not made for the purpose of delay.

CHARLES S. THOMAS.

HENRY C. HALL.

(Endorsed:) Filed Mar. 10, 1910. John D. Jordan, Clerk.

56 (*Certified Copy of Proof of Publication of Notice of Hearing in Probate Court of Petition for Removal of Executor.*)

And on the eighteenth day of June, A. D. 1910, a certified copy of Proof of Publication of Notice of Hearing in Probate Court of Petition for Removal of Executor was filed in said cause, in the words and figures following, to-wit:

THE STATE OF MICHIGAN:

The Probate Court for the County of Ottawa.

At a session of said court, held at the probate office, in the City of Grand Haven, in said county, on the 26th day of June, A. D. 1903.

Present: Hon. Edward P. Kirby, Judge of Probate.

In the Matter of the Estate of WILLIAM M. FERRY, Deceased.

Elizabeth Eastman, and William Montague Ferry, Amanda Harwood Hall, Hannah Elizabeth Jones, Edward F. Eastman, Thomas White Eastman, George Mason Eastman, Hettie Eastman, Hannah Elizabeth Wulzen, Mary White Eastman and Mary Amanda Fairchild by Henry C. Hall, their attorney, having filed in said court their petition praying that Edward P. Ferry be removed as executor of the will of said deceased by an order of this court, and that he or his representatives be ordered to account forthwith to this court for the estate of said deceased down to the date of said accounting, and that the administration of the estate of said deceased be granted unto the Michigan Trust Company as administrator be bonis non with the will annexed, or to some other suitable person,

It is ordered, That Tuesday, the 21st day of July, A. D. 1903, at ten o'clock in the forenoon, at said probate office, be and is hereby appointed for hearing said petition;

It is further ordered, That public notice thereof be given by publication of a copy of this order, for three successive weeks previous to said day of hearing, in the Grand Haven Courier Journal a newspaper printed and circulated in said county.

EDWARD P. KIRBY,

Judge of Probate.

A true copy.

FANNY DICKINSON,

Probate Clerk.

57 STATE OF MICHIGAN:

The Probate Court of the County of Ottawa.

In the Matter of the Estate of WILLIAM M. FERRY, Deceased.

Printed Copy.

COUNTY OF OTTAWA, *ss*:

Harry S. Nichols being duly sworn, says: I am the clerk of the printer of the Grand Haven Courier Journal, a newspaper printed and circulated in said county. The annexed is a printed copy of a notice which was published in said paper on the following dates, to-wit:

June 27 A. D. 1903.

July 4 A. D. 1903.

July 11 A. D. 1903.

HARRY S. NICHOLS.

Subscribed and sworn to before me this Eleventh day of July, A. D. 1903.

H. G. NICHOLS,
A Notary in and for Ottawa County,
State of Michigan.

\$4.445.

My commission expires — —, 19—.

STATE OF MICHIGAN:

The Probate Court for the County of Ottawa.

In the Matter of the Estate of WILLIAM M. FERRY, Deceased.

I, Edward P. Kirby, Judge of said court, having the legal custody of the files and records thereof do hereby certify that I have compared the attached copy of Proof of publication of order entered on the 26th day of June, 1903, setting the 21st day of July, 1903, for hearing the petition of Elizabeth Eastman, et al., praying that

Edward P. Ferry be removed as executor and that he or his representatives be ordered to account forthwith and that the administration of the estate of said deceased be granted to the Michigan Trust Company, as administrator *de bonis non* with the will annexed, or to some other suitable person, filed in said Court on the 14th day of July, 1903, with the original thereof on file in said court and have found the same to be a correct transcript therefrom, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Grand Haven, in said county this 24th day of February, A. D. 1910.

[SEAL.]

EDWARD P. KIRBY,

Judge of Probate.

(Endorsed): No. —, State of Michigan. Probate Court for the County of Ottawa. Estate of William M. Ferry, Deceased. Exemplification of Record.

(Endorsed): No. 3107. Michigan Trust Company, Plaintiff in Error, vs. Edward P. Ferry. No. 3108. Michigan Trust Company, Plaintiff in Error, vs. Edward P. Ferry. Certified copy of Proof of Publication of Notice of Hearing in Probate Court of Petition for Removal of Executor. Filed Jun-18, 1910, John D. Jordan, Clerk.

(Order Denying Petition for Rehearing.)

And on the eighteenth day of June, A. D. 1910, in the record of the proceedings is an order denying the petition for a rehearing in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1910, Saturday, June 18, 1910.

No. 3107.

THE MICHIGAN TRUST COMPANY, Plaintiff in Error,
vs.
EDWARD P. FERRY.

In Error to the Circuit Court of the United States for the District of Utah.

59 This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Plaintiff in Error. On Consideration Whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

June 18, 1910.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Eighth Circuit (except the transcript of the record from the Circuit Court of the United States for the District of Utah), in a certain cause in said Court wherein The Michigan Trust Company, a Corporation, is Plaintiff in Error, and Edward P. Ferry is Defendant in Error, No. 3107, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the eighteenth day of August, A. D. 1910, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the Circuit Court of the United States for the District of Utah.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirteenth day of December, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

61 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 3107.

MICHIGAN TRUST COMPANY, Plaintiff in Error,
vs.
EDWARD P. FERRY, Defendant in Error.

It is hereby stipulated between the parties that the certified Transcript of the Record herein, now on file in the office of the Clerk of the Supreme Court of the United States, may be taken as and for a return to the Writ of Certiorari directed from the Supreme Court of the United States to this Court, granted on the 6th day of March, 1911, and that this Stipulation may be certified by the Clerk of this Court as and for such return.

Dated April 6th, 1911.

HENRY C. HALL,
E. B. CRITCHLOW,
Attorneys for Plaintiff in Error.
FRANKLIN S. RICHARDS,
EDWARD S. FERRY,
Attorneys for Defendant in Error.

[Endorsed:] No. 3107. The Michigan Trust Co., Plaintiff in Error, vs. Edward P. Ferry. Stipulation as to return to Writ of Certiorari. Filed Apr. 10, 1911, John D. Jordan, Clerk.

62 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Michigan Trust Company is plaintiff in error, and Edward P. Ferry is defendant in error, No. 3107, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of Utah, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you
63 send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 11th day of March, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

64 [Endorsed:] File No. 22,471. Supreme Court of the United States, No. 850, October Term, 1910. The Michigan Trust Co. vs. Edward P. Ferry. Mar. 31. Writ of Certiorari. Filed Apr. 10, 1911. John D. Jordan, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The Michigan Trust Company, Plaintiff in Error, vs. Edward P. Ferry, No. 3107, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause as mentioned in the certificates thereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this tenth day of April, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

65 [Endorsed:] File No. 22,471. Supreme Court U. S. October Term, 1910. Term No. 850. The Michigan Trust Co., petitioner, vs. Edward P. Ferry. Writ of certiorari and return. Filed April 12, 1911.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1910.

No. _____.

THE MICHIGAN TRUST COMPANY, A CORPORATION,
Petitioner,

vs.

EDWARD P. FERRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, The Michigan Trust Company, respectfully petitions this Honorable Court that Writ of Certiorari may be granted directing the Circuit Court of Appeals for the Eighth Circuit to certify to this Honorable Court for its review and determination the case of your petitioner, The Michigan Trust Company,

a corporation, plaintiff, versus Edward P. Ferry, defendant, and respectfully shows:—

First: This action was brought in the Circuit Court for the District of Utah by The Michigan Trust Company, a corporation, plaintiff, against Edward P. Ferry, defendant, upon a final decree rendered in the Probate Court of Ottawa County, Michigan, whereby among other things, Edward P. Ferry was directed to pay \$915,355.08 to The Michigan Trust Company as administrator *de bonis non* with the will annexed (Trans. page 8), the jurisdiction of the federal court being based on diversity of citizenship. Demurrer to the complaint was sustained on the grounds, as expressed by Judge Marshall (Circuit Court) in his opinion, that the decree rendered by the probate court was not final and was not in favor of the plaintiff, and that therefore no action could be maintained upon it. Thereafter an amended complaint was filed setting forth more in detail the proceedings had prior to entry of the probate court decree, and demurrer to this amended complaint was sustained by Judge Marshall without opinion.

Second: Writ of error was then taken from the United States Circuit Court of Appeals for the Eighth Circuit to the Circuit Court, and the judgment of the lower court was there affirmed (Trans. page 49). The opinion of the Circuit Court of Appeals is hereto attached and made a part hereof (pages 15-42).

Thereafter on June 18, 1910, a petition for rehearing was denied by the Circuit Court of Appeals. The record of the Circuit Court and Circuit Court of Appeals, with copies, is submitted in conjunction with this petition.

Third: Briefly stated, the proceedings had in

Michigan leading up to the probate court decree are these:

In the year 1867, Rev. William M. Ferry, a former missionary to the Indians at Mackinac and subsequently the founder of Grand Haven in the County of Ottawa, Michigan, died a citizen and resident of that county, leaving a last will and testament which was admitted to probate in 1868 in the probate court of that county. It disposed of what was perhaps at that time the largest fortune in western Michigan, by dividing the residuum, after certain specific and charitable bequests, among his six children, one-fourth to each of his three sons and one-twelfth to each of his three daughters. His sons were Lieut. Col. William M. Ferry, Senator Thomas W. Ferry, and the respondent herein, Edward P. Ferry. The will in terms gave the executor ten years, or more if he deemed necessary, in which to settle the estate. The executor duly qualified in said probate court, and not elsewhere, and in due course filed in that court his first and second annual accounts. He filed no other. The second annual account showed a large balance of assets on hand. Thereafter, and before the expiration of said ten years, Edward P. Ferry removed from Michigan to Utah. He there subsequently became a mental incompetent and was so adjudged in February, 1901, and thereupon his sons W. Mont Ferry and Edward S. Ferry were appointed and qualified as guardians of his person and estate.

Fourth: On June 26, 1903, all of the residuary legatees and devisees then living (except Edward P. Ferry) and the representatives and successors in interest of all of them who were then deceased, filed in said probate court their petition praying that Edward P.

Ferry be removed as executor by an order of that court and that "he or his representatives be ordered to account forthwith to this court for the estate of said deceased down to the date of said accounting," and that administration be granted to The Michigan Trust Company, petitioner herein, or to some other suitable person as administrator *de bonis non* with the will annexed (Trans. page 57); and thereafter the court by its order fixed the 21st day of July, 1903, for the hearing of said petition. It further ordered that notice thereof be given by publication in a newspaper designated in accordance with the statutes of Michigan in such case made and provided (Trans. page 57). The said order was duly published as therein directed and according to the statute in such case made and provided (Trans. page 58), and personal service of said order and notice was made upon Edward P. Ferry and also upon his said guardians, W. Mont Ferry and Edward S. Ferry, at Salt Lake City, Utah (Trans. page 3).

Fifth: Upon the day so fixed for hearing Edward P. Ferry appeared by his counsel, and by his guardian *ad litem* and next friend appointed by said court on due application therefor on his behalf, said counsel, guardian *ad litem* and next friend being all employed for that purpose by the guardians of said Edward P. Ferry under order and permission of the District Court for the Third Judicial District of Utah, which court had theretofore appointed said guardians (Trans. pages 3-4), and filed his answer to the said petition, as also his cross petition praying for affirmative relief. Answer to this cross petition was filed by the original petitioners, and the issues so joined were set for hearing (Trans. page 4).

Sixth: During the progress of that hearing Edward P. Ferry appeared therein and was represented by his several attorneys, as well as by his guardian *ad litem* and next friend. (Trans. pages 4-5.) Proofs were taken in behalf of the petitioners and also in behalf of Edward P. Ferry. In 1905 an interlocutory order was made by the probate court requiring the executor to file a more detailed statement of account of his receipts and disbursements for said estate since his second annual account, including the disposition made of assets on hand at the date of said second annual account and of any other assets of said estate not already accounted for by the executor in that court. (Trans. page 10.) The executor contended before the probate court that no further account should be required, and he neglected and refused to render any such account. (Trans. page 10.)

Seventh: Thereafter, by leave of court, further proofs were taken and after the same were concluded, and as preliminary to final order on the merits, the probate court ordered notice to be given that upon a day therein fixed the account, as the petitioners claimed the same to be, would be submitted to the court, and that application would then and there be made for the examination and approval thereof, and further for leave to charge, surcharge and falsify the alleged final account of said executor then before the court, to file amendments and objections thereto, and that the said petitioners would then and there move the court for a final decree on the merits in the matter of said account. (Trans. pages 10-11.) This order was duly published, as therein directed, giving all persons interested notice of the same, and personal notice by service thereof in Utah was also given to all persons in-

tered of the examination of the said final account in accordance with the order of the probate court and the statute of Michigan in such case made and provided. (Trans. page 11.)

Eighth: Pursuant to said order and notice the petitioners by leave of court made and submitted to the court a statement charging, surcharging and falsifying the alleged final account of the executor already before the court, which statement presented the proposed amendments and objections thereto, and stated said account, based upon proofs taken, as the petitioners claimed the same to be. The accountant for petitioners was thereupon cross-examined on behalf of the executor, and the court after carefully examining and correcting the alleged final account of the executor and all other statements and accounts submitted (Trans. pages 10-11) rendered its decree on December 31, 1907.

Ninth: By this final decree the probate court found that the executor had not accounted for all the moneys and properties of the estate coming into his hands, and was not entitled to discharge; that at the time of rendition of the second annual account he had on hand large amounts of money and property belonging to the estate; that since that date and down to the year 1900 other large amounts of money and property belonging to the estate had come into his hands, none of which had been accounted for by him; and ~~the~~ large amounts of money and property belonging to the estate had been received, misappropriated and converted by him to his own use instead of being applied to or for the benefit of the estate. (Trans. pages 11-12.)

The probate court further found that the estate

had not been fully administered; that the executor was not entitled to an order closing the estate; that it was his duty to render a true and perfect account of his doings as such executor, but this he had neglected and refused to do; that those acting for him had taken from Michigan to Utah books and papers containing his accounts as executor, had refused to return the same when ordered by the court to do so, and had, in so far as lay in their power, suppressed evidence and endeavored to prevent the rendition of a decision on the merits, but that the proofs taken afforded such data as to enable the court to state the executor's account truly, correctly and without injustice to the executor (Trans. page 13). The probate court further found from the proofs that, after crediting all disbursements, Edward P. Ferry, the executor, was indebted to the estate on that date upon balance of accounts in the sum of \$1,220,473.44. (Trans. page 14.)

Tenth: Upon these and other findings (Trans. pages 11-14) the decree denied the cross-petition of Edward P. Ferry (Trans. page 15), removed him as executor and appointed the petitioner herein as administrator *de bonis non* with the will annexed (Trans. page 15), permitted him as residuary legatee to retain one-fourth of the net balance aforesaid as fixed by the decree (Trans. page 16), and adjudged that the remainder, to-wit, \$915,355.08, for which he was individually liable, be paid by him to this petitioner, as administrator as aforesaid (Trans. page 16).

Eleventh: A copy of this decree was attached to and made a part of the said amended complaint. (Trans. pages 8, 9-17.) The amended complaint in giving the substance of the petition dated June 26, 1903,

in the probate court summarized the prayer for accounting as being that Edward P. Ferry be ordered to account forthwith to said court "for the residue of said estate of said deceased which was unadministered." (Trans. page 2.) The word "administered" was there used in the sense given it by the jurisprudence of Michigan.

Twelfth: Your petitioner is advised and so believes that the said decision of the Circuit Court of Appeals sustaining the judgment of the Circuit Court upholding the demurrer there interposed is erroneous, without legal justification and contrary to the rules, decisions and principles of law applicable to such cases.

The grounds upon which this Court is asked to review the judgment of the Circuit Court of Appeals are:—

I. Because the Circuit Court of Appeals of the Eighth Circuit has failed to give full faith and credit to the final judgment of a state court of general jurisdiction in matters relating to settlement of estates, to-wit, the decree of the Probate Court of Ottawa County, Michigan. The denial of such faith and credit is due to errors of said Court apparent from its opinion in this cause and committed, *inter alia*, in the following particulars:

(a) Said Court erred in holding that the accounting in the probate court of Michigan could be had only of the assets then remaining unadministered in the hands of the executor as such, thereby failing to recognize the force and binding effect of Section 9428 (Comp. Laws of Mich., 1897), which is as follows:

"Every executor and administrator shall be chargeable in his account with the whole of the

goods, chattels, rights and credits of the deceased, which may come to his possession; also, with all the proceeds of the real estate which may be sold for the payment of debts and legacies, and with all the interest, profit and income which shall in any way come to his hands from the estate of the deceased."

(b) Said Court erred in holding that under the laws of Michigan assets of an estate which have been converted by an executor and appropriated to his own use are "administered" assets, and that the probate court of Michigan had no jurisdiction to require the defaulting executor to account for such converted and misappropriated assets—this holding being in direct conflict with the rule laid down in Michigan.

Lafferty vs. The People's Bank, 76 Mich., 35.
Hall vs. Grovier, 25 Mich., 427.

(c) Said Court erred in not recognizing or giving force or effect to the notice served personally and by publication upon the executor, who was then before the probate court accounting to it, fixing date for examination of the final account of the executor and the statement of the petitioners charging, surcharging and falsifying his alleged final account.

(d) Said Court erred in limiting by construction and interpretation the power and jurisdiction of the probate court to compel the executor to "account," that is, to state honestly the items with which he should be charged and credited, and to pay over and deliver the balance in full.

Hall vs. Grovier, 25 Mich., 427.
Pyatt vs. Pyatt, 46 N. J. Eq., 285.

(e) Said Court erred in holding that no claim or charge against the executor for loss to the estate by reason of his waste or maladministration could be considered by the probate court in removing the executor and settling his account, and that the decree was improperly rendered against Edward P. Ferry, individually.

Comp. Laws, Mich., 1897, Section 9435.

“When an executor or an administrator shall neglect or unreasonably delay to raise money, by collecting the debts or selling the real or personal estate of the deceased, or shall neglect to pay over the money he shall have in his hands, and the value of the estate shall thereby be lessened, or unnecessary cost or interest shall accrue, or the persons interested shall suffer loss, the same shall be deemed waste, and the damages sustained may be charged against the executor or administrator in his account, or he shall be liable therefor on his administration bond.”

Bascom vs. Taylor, 39 Mich., 682;
 Stevens vs. Kirby, 156 Mich., 526;
 Clark vs. Fredenberg, 43 Mich., 263;
 Pierce vs. Holzer, 65 Mich., 263;
In re Palm's Appeal, 44 Mich., 637.

And, in consequence, said Court erred in holding that any charge or claim against the executor for loss to the estate by reason of his waste or maladministration constituted a challenged cause of action *in personam* at common law, to-wit for *devastavit*, to be pleaded and noticed as such, of which the probate court had no jurisdiction.

(f) Said Court erred in holding that the probate court had no jurisdiction to direct that the balance due

from the executor to the estate be paid to the administrator *de bonis non* appointed in his place and stead, and in this connection the said Court erred in not taking cognizance of the presence in Court and consent of all parties who might lay claim to that balance.

Storer vs. Storer, 6 Mass., 390;
 Campau vs. Gillette, 1 Mich., 416;
 Butterick vs. King, 7 Metc., 20;
 Wiggin vs. Swett, 6 Metc., 194, 198;
 Sewall vs. Patch, 132 Mass., 326;
 Minot vs. Norcross, 143 Mass., 326;
 Cranson vs. Wilsey, 71 Mich., 356.

Morris vs. Morris, 4 Grattan (Va.), 293.

And said Court erred in holding that the only way in which the probate court may ever acquire any jurisdiction whatever over claims against the executor because of his neglect or maladministration is by action on his bond by the judge of probate.

(g) Said Court erred in holding that the decree of the probate court attempted to deprive Edward P. Ferry of property without due process of law.

Fitzsimmons vs. Johnson, 90 Tenn., 416.

(h) Said Court erred in failing and refusing to give force and effect to the affirmative act of the executor, Edward P. Ferry, who by his next friend invoked the jurisdiction of the Probate Court, by a cross-petition filed in the proceeding wherein his acts as executor were brought in question, and in said cross-petition asked that his accounts be allowed and that he be discharged as executor, and offered proofs in support of

said cross-petition. This cross-petition was denied by the decree.

In the matter of Moore, 209 U. S., 490.

II. Because the Circuit Court of Appeals failed to construe a judgment of Michigan in accordance with the statutes and decisions of that State, and the construction given is opposed to and conflicts with the decisions of the highest court of Michigan.

III. Because of the very great importance of this case to the parties and the amount involved therein.

IV. Because of the great importance of this case to the public in that the judgment of the Circuit Court of Appeals of the Eighth Circuit, as it stands, gives immunity to an absconding executor or administrator who has despoiled the estate he represents, and denies to the Michigan Court which appointed him the right to compel him to respond to it for a breach of the duty owed to said Court.

V. Because the decision of the Circuit Court of Appeals, if suffered to remain unchanged, establishes rules of law in the matter of decedents' estates in Michigan, which are in direct conflict with the statutes and decisions of Michigan, but which nevertheless are controlling upon all federal circuit courts in the Eighth Circuit, and authoritative in all other federal courts, including those sitting in Michigan, thus presenting to this Honorable Court a question of the highest public importance, worthy of its consideration and review in the public interest.

VI. Because as your petitioner is informed and believes the judgment in this case is made final in the Cir-

cuit Court of Appeals, except for the interposition by this Court as herein prayed.

WHEREFORE, in view of the premises aforesaid your petitioner respectfully prays that this Court will grant its writ of certiorari directed to the United States Circuit Court of Appeals of the Eighth Circuit, commanding said Court to certify and send to it on a day to be therein designated a full and complete transcript of the record of the said Circuit Court of Appeals in the said cause therein pending entitled: "The Michigan Trust Company, a corporation, plaintiff in error, vs. Edward P. Ferry, defendant in error, Number 3107," to the end that said cause may be reviewed and determined by this Court under and pursuant to Section 6 of the Act of Congress entitled: "An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for other Purposes," approved March 3, 1891, and that said judgment of the said Circuit Court of Appeals in said cause be reversed by this Honorable Court, and that your petitioner have such other and further relief as the nature of the case may require and as to this Court may seem proper in the premises.

Your petitioner will ever pray.

WILLARD F. KEENEY,
EDWARD B. CRITCHLOW,
HENRY C. HALL,

Attorneys for Petitioners.

CHARLES S. THOMAS,
WALTER I. LILLIE,
WALTER E. ERNST,

Of Counsel.

STATE OF MICHIGAN, }
County of Kent. } ss.

LEWIS H. WITHEY, being first duly sworn, deposes and says that he is an officer of The Michigan Trust Company, a corporation, the petitioner herein, to-wit, its President; that he has read the foregoing petition and knows the contents thereof; that the same is true of his knowledge except as to the matters therein stated to be alleged on his information and belief, and as to those matters he believes it to be true.

LEWIS H. WITHEY.

Subscribed and sworn to before me, this 30th day of December, 1910.

ARTHUR C. SHARPE,
(Notarial Seal.) Notary Public.

My commission expires June 5, 1913.

CERTIFICATE OF COUNSEL.

I hereby certify that I have carefully examined the foregoing petition for writ of certiorari, and the allegations thereof are true as I verily believe, and that in my opinion the same is well founded and the case is one in which the prayer of the petitioner should be granted by this Honorable Court.

WILLARD F. KEENEY,
Attorney for Petitioner.

OPINION OF CIRCUIT COURT OF APPEALS.

United States Circuit Court of Appeals, Eighth Circuit.

December Term, A. D. 1909.

The Michigan Trust Company, a corporation,
Plaintiff in Error.

vs.

No. 3107.

Edward P. Ferry,
Defendant in Error.

In Error to the Circuit Court of the United States for
the District of Utah.

Mr. Henry C. Hall and Mr. Edward B. Critchlow
(Mr. Dunbar F. Carpenter, was with them on the
brief), for plaintiff in error.

Mr. Waldemar Van Cott and Mr. Joseph T. Richards,
for the defendant in error.

Before SANBORN and VAN DEVANTER, Circuit
Judges, and WILLIAM H. MUNGER, District Judge.

Syllabus.

1. Probate Court of Michigan—No Jurisdiction of
Personal Claim for Devastavit—Facts—Conclusions.

In 1867 F was appointed executor of the will of his father by a probate court in Michigan. He qualified and filed two reports prior to 1871. He became a resident of Utah in 1878, and was adjudged incompetent and guardians of his person and estate were appointed by a Utah court in 1901. In 1903, the residuary distributees of his father's estate filed a petition in the Michigan court that he account for the unad-

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ministered assets of that estate and that the Trust Company be appointed administrator *de bonis non* in his place, and a notice of hearing of this petition was published as prescribed by the Michigan statutes and served on him in Utah. By a guardian *ad litem* and next friend and by attorneys employed by his general guardians by authority of the Utah court he appeared, defended and filed a cross-petition to the effect that he should not be required to account and that the administration should be closed. After evidence and hearing the Michigan court found that he had committed a *devastavit*, decreed that he was personally liable to the estate and that he should pay out of his individual property to the Trust Company which it appointed administrator *de bonis non*, \$915,355.08. The Trust Company brought an action against F in Utah upon this decree.

Held: (1) The probate court in Michigan had jurisdiction to settle the account of the assets of the estate between F, the executor and the estate and to order him to turn them over to a *successory administrator*.

(2) It had no jurisdiction to adjudicate the claim against him personally and against his individual property for his *devastavit*, or to order the amount it adjudged due on account of that claim paid to the Trust Company as administrator *de bonis non* or otherwise.

2. Due Process—Substituted Service—Acceptance of Privilege Conditioned by, Estops from Denying Sufficiency.

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One who accepts an office, a right, or a privilege bestowed by virtue of the statutes of a state which provide that the courts of that state may acquire jurisdiction to determine specified controversies between him and others by means of a published notice of hearing thereof consents to the service of notice thereof in that way and is estopped from denying its sufficiency.

3. Probate Court—Devastavit—No Jurisdiction of a Personal Claim for.

A proceeding for the administration of an estate is a proceeding in rem.

A claim of residuary legatees and devisees against the person and the individual property of one who has been an executor or administrator of an estate founded upon his conversion and mal-administration of the assets thereof, is a claim in personam and it is not within the scope of the jurisdiction of a probate court in Michigan in a proceeding for the administration of an estate.

4. Probate Court—Devastavit—No Jurisdiction to Decree Payment for to Administrator De Bonis Non.

An administrator de bonis non takes the unadministered assets of an estate only, and those which do not remain in specie but have been changed in form, mixed with those of the former executor or converted to the latter's use, are administered assets.

A claim against the person or the individual property of an administrator or executor for debt or damages on account of his conversion or maladministration of the assets of the estate is the property of the

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creditors and distributees thereof and not of an administrator *de bonis non*, and a probate court has no jurisdiction to decree its payment to such a *successory administrator*.

5. *Jurisdiction*—Portion of Decree in Excess of Void.

That portion of an order, judgment, or decree of a court, which has jurisdiction of a subject-matter and of the parties to it, which is in excess of its jurisdiction is as futile as a decree without any jurisdiction.

6. *Due Process*—Personal Service or Appearance Requisite in Personal Actions.

Personal service of notice within the jurisdiction of the court, or a voluntary appearance, or a consent to substituted service, is indispensable to the jurisdiction of a court to adjudicate a claim which is merely personal or which charges property of the defendant beyond the territorial jurisdiction of the court.

7. *Due Process*—Notice must Warn of Claim and of Relief Sought.

The notice which will constitute due process of law must be such that the defendant may be advised from it of the nature of the claim against him and of the relief sought from the court if the claim is sustained.

8. *Due Process*—Question for Federal Courts—Not Governed by State Laws and Decisions.

State laws and decisions cannot determine for the national courts what constitutes sufficient process of

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law sufficient service of process or sufficient appearance of parties, but it is their duty to exercise their independent judgment in deciding these questions notwithstanding the full faith and credit provision of the Constitution.

9. Due Process—Insufficient Notice.

Notice of a hearing before a probate court of a petition for the settlement of an account of an executor for his removal and the appointment of an administrator *de bonis non* is not due process of law to sustain a decree against the person and the property of the individual served to the effect that he pay out of his own property \$915,355.08 to the successive administrator on account of his conversion and maladministration of the assets of the estate.

10. Guardian Ad Litem—Previous Jurisdiction of Ward Indispensable to his Authority and to Power of Court to Appoint him.

No court has jurisdiction to appoint a guardian ad litem to defend, and no guardian ad litem has authority to defend, or to submit to any court, or to appear in the litigation over any claim or controversy of which that court had not previously acquired jurisdiction by service of due process upon his ward.

11. General Guardians—No Authority to Charge Estate or Person of Ward by Appearing in Other Jurisdictions.

Neither the general guardians of the person and estate of a ward, nor the court which appoints them,

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have any power to charge the person or the property of their ward within the territorial jurisdiction of that court by defending in or submitting to any court within another jurisdiction or by appearing therein in any litigation over any claim of which the latter court had not otherwise acquired jurisdiction.

SANBORN, Circuit Judge, delivered the opinion of the court.

The Michigan Trust Company, a corporation of the State of Michigan, brought this action in the Circuit Court of the District of Utah to recover \$915,355.08 from Edward P. Ferry, a citizen of that district. The Circuit Court sustained a demurrer to the plaintiff's complaint and denied a motion to amend it and these rulings are assigned as error. The material facts set forth in the complaint and the proposed amendment are these: In the year 1867 the defendant, Edward P. Ferry, who was then a citizen of Michigan, was appointed executor of the will of his deceased father, William M. Ferry, by the Probate Court of the County of Ottawa, in the State of Michigan. He qualified as such executor, entered upon the discharge of the duties of his office, filed two annual accounts, one in March, 1869, and another in March, 1870, and took possession and disposed of a large amount of property of the estate.

In 1878, he removed from Michigan and became a resident and citizen of Utah. On February 13, 1901, he was adjudged to be an incompetent person by the district court of the third judicial district of the State of Utah, his sons, W. Mont Ferry and Edward S. Ferry, citizens of Utah, were by that court appointed guardians of his person and of his estate and have since acted as such.

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On June 26, 1903, residuary legatees and devisees under the will of William M. Ferry filed in the probate court in Michigan their petition wherein they prayed that Edward P. Ferry should be removed as executor of his father's will, "that he or his representatives be ordered to account forthwith to said court for the residue of said estate of said deceased which was unadministered, for the appointment of the Michigan Trust Company, plaintiff herein, or some other suitable person, as administrator de bonis non with the will annexed of said estate, and that such probate court make such other and further order in the premises as to it might seem proper." Thereupon the probate court made an order that the petition should be heard on July 21, 1903, caused a notice of the petition and of the time and place of the hearing thereon to be published in a newspaper as required by the statutes of Michigan, a copy of the order was served on Edward P. Ferry and upon his guardians in the State of Utah, the District Court of Utah ordered that the guardians of the estate of Edward P. Ferry be permitted to defend against the claim of this petition and these guardians retained attorneys who undertook such a defense and were paid by the District Court out of the estate of Edward P. Ferry in Utah. On motion of these attorneys the probate court of Ottawa County appointed one of them guardian ad litem and next friend of Edward P. Ferry, and he filed an answer to the petition of the legatees and devisees and a cross-petition wherein he alleged that Edward P. Ferry had fully administered and accounted for the estate of his father and prayed that he be discharged as executor. An answer to this cross-petition was filed, there was a hearing upon the issues pre-

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sented by these pleadings and thereafter the Michigan probate court found that the estate of William M. Ferry had not been fully administered, that Edward P. Ferry was not entitled to an order closing it, that it was his duty to render a true account of his doings as executor, that he had failed to do so, that the probate court had been compelled to and had made such an account, that there were errors, mistakes and fraud in the rendition of the two annual accounts made by Edward P. Ferry as executor in 1869 and 1870, which the court had corrected, that large amounts of money and of property of the estate of his father had come to the hands of Edward P. Ferry as executor which he had misappropriated and converted to his individual use, that "Edward P. Ferry, executor, is indebted to the estate of Rev. William M. Ferry, deceased, at this date, upon balance of account, in the full and true sum of One Million Two Hundred and Twenty Thousand Four Hundred and Seventy-three and 44-100 Dollars (\$1,220,473.44); and that said sum of money is now justly due and owing by said Edward P. Ferry to said estate, over and above all legal set-offs or counter-claims", and this court ordered and decreed that the prayer of the cross-petition be denied, that Edward P. Ferry be removed from his office of executor, that the Michigan Trust Company be appointed administrator de bonis non with the will annexed of the estate of William M. Ferry upon the filing of its acceptance of the trust, that as Edward P. Ferry is himself a residuary legatee of one-fourth of the residue of the estate of his father he should not be required to pay over that portion of the amount due from him as executor to the estate, but that "the remainder of the indebtedness owing

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by said Edward P. Ferry, said executor to the estate of said William M. Ferry, deceased, is the sum of Nine Hundred and Fifteen Thousand Three Hundred and Fifty-five and 08-100 Dollars (\$915,355.08), and it is further ordered, adjudged and decreed that said Edward P. Ferry is individually liable therefor to the estate of William M. Ferry, deceased, and that, within sixty days from this date, said Edward P. Ferry, said executor, do pay the sum of Nine Hundred and Fifteen Thousand Three Hundred and Fifty-five and 08-100 Dollars (915,355.08) to the Michigan Trust Company, administrator de bonis non with the will annexed of the estate of said William M. Ferry, deceased, together with interest on said sum from this date until paid at the rate of five (5%) per cent. per annum". After this order and decree was made the guardian ad litem and next friend of Edward P. Ferry tried to take an appeal therefrom but did not succeed.

Has a probate court which lawfully appoints one executor of an estate, jurisdiction upon substituted service of notice upon him in another jurisdiction to adjudicate his individual liability for the taking of property of the estate from himself as executor and the conversion of it to his own personal benefit? If so, has such a court jurisdiction to determine and fix this individual liability without notice to him that such an adjudication would be sought and if warranted by the proof might be rendered?

The cause of action set forth in the complaint rests upon the decree of the Probate Court of Ottawa County that Ferry the individual is liable for a fixed amount of damages for his taking from himself as executor and his conversion to his own

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use of property of the estate which came to his hands as executor. If that court had jurisdiction to render that adjudication the complaint stated a good cause of action, if it did not have that jurisdiction the demurrer was rightly sustained.

If another person had been the executor and Ferry had taken from him in Michigan property of the estate of his father, had converted it to his own use and then left the state there could have been no doubt that no court in Michigan could have acquired jurisdiction to determine his liability therefor by the publication of any summons or notice, or by the service of any notice upon him beyond the boundary of the state. Personal service upon him within the jurisdiction of the court, within the State of Michigan, or his voluntary appearance would have been indispensable to the acquisition of jurisdiction to determine his liability.

The statutes of Michigan require any executor before he enters upon the execution of his trust to give a bond to the Judge of Probate in such sum as he may direct to administer according to law and to the will of the testator all his goods, chattels, rights, credits and estate which shall at any time come to his possession, but no court of Michigan could have acquired jurisdiction to adjudge the liability of an obligor on such a bond upon substituted service when he was beyond the jurisdiction of the court. The laws of a state have no extra-territorial force; no tribunal established by it can extend its process beyond the bounds of the state so as to subject either persons or their property to its decisions without their consent. Whenever a judicial proceeding involves the adjudication of the personal liability merely or of the liability of the

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property of the defendant without the state he must be brought within the jurisdiction of the court by service of process upon him within the state or by his voluntary appearance. *Pennoyer v. Neff*, 95 U. S. 714, 722, 723, 727, 732, 733; *D'Arcy v. Ketchum*, 11 How. 165, *174, *176; *Galpin v. Page*, 18 Wall. 350, 367, 368, 369; *Insurance Company v. Bangs*, 103 U. S. 435, 439, 440; *Old Wayne Life Ass'n. v. McDonough*, 204 U. S. 8, 17-21; *Brown v. Fletcher's Estate*, 210 U. S. 82, 90, 91, 92.

How then can the judgment of the probate court in this case be sustained? Counsel for the plaintiff answer on the ground that Ferry accepted the appointment of executor and thereby submitted himself to the power of the Michigan court and his departure from that state failed to deprive that court of jurisdiction over him. To the extent that his acceptance of his office and the notice of hearing which was published extended the jurisdiction of that court over him this answer seems to be sound. The statutes of Michigan granted power to this probate court to notify and require every executor and administrator appointed by it to render to it an account of all moneys and other property of the estate he was administering in his hands as such executor or administrator and of the proceeds and expenditures thereof, Compiled Laws of Michigan, Sec. 9345; to give this notice by publication, Secs. 688, 9346; to remove the executor or administrator if he failed to render to the judge of probate a satisfactory statement of his accounts, Sec. 9347; and to cause the bond of the executor or administrator to be prosecuted whenever he should refuse or omit to perform the order or decree

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of the court for the rendition of an account or upon a final settlement or for payment of debts, legacies or distributive shares, Sec. 9491. Those statutes also provided that in such a case the writ should run in the name of the judge of probate, Sec. 9492; that if judgment should be rendered execution should be awarded for the value of all the estate of the deceased which should have come to the hands of the executor or administrator for which he should not have accounted "and for all such damages as shall have been occasioned by his neglect or maladministration", Sec. 9495; that all moneys received on any such execution should be paid to the rightful executor or administrator and should be assets in his hands to be administered according to law, Sec. 9496; and that when an executor or administrator, after being duly cited by the probate court should neglect to render his account, he should be liable on his bond for all damages which might accrue and his bond might be put in suit by any person interested in the estate, Sec. 9439. The petition of the residuary legatees and the notice of hearing thereon which was published pursuant to the statutes gave the defendant ample warning that the question whether or not he should be removed as executor, whether or not he should be ordered to account for the residue of the estate of his father unadministered, and whether or not the Trust Company should be appointed administrator de bonis non in his place, would be considered and might be decided by the court at the hearing. When the office of executor was tendered to him by that court the statutes of Michigan provided that, if he accepted that office, that court might acquire jurisdiction to determine all these issues between him

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and the legatees of his father's estate upon a service of a notice of the time and place of hearing upon him by publication. That office was tendered to him on the condition imposed by these statutes that the probate court should have the power to call him before it and to adjudicate these issues for or against him without other warning than a notice published in a newspaper, and he necessarily accepted that condition when he accepted his office. That condition was not limited to instances in which one or more of these issues should arise while he was in the State of Michigan, but it included all cases in which one or more of these issues should arise while he was executor and was as effective after as before his departure from the state. One who accepts an office, a right, or a privilege bestowed by virtue of the statutes of a state which provide that the courts of that state may acquire jurisdiction to determine specified controversies between him and others by means of a published notice of hearing thereof, consents to the service of notice in that way and is estopped from denying its sufficiency. By the defendant's acceptance of the office of executor from the Michigan probate court and by that court's published notice of the time and place of its hearing that court acquired plenary jurisdiction to adjudicate whether or not he should be removed as executor, whether or not he should account for the unadministered assets of his father's estate, the true state of that account, and whether or not the Trust Company should be appointed administrator *de bonis non*, and its determination of these issues was conclusive. *Spencer v. Houghton*, 68 Calif. 82, 88, 89; *Trumper v. Cotton*, 109 Calif. 250, 254, 255; *Moore v.*

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Fields, 42 Pa. St. 467, 473; Martin v. Martin, 214 Pa. St. 389, 394; Usry v. Usry, 8 S. E. (Ga.) 60, 61; Stevens v. Kirby, 121 N. W. (Mich.) 477, 480.

It is one thing, however, to adjudge the true state of the account of the assets of an estate in the hands of an executor and to require him to pay or deliver them to his successor and a very different thing to adjudge that the person who holds the office of executor has taken assets of the estate from himself as executor, has committed a *devastavit* and is personally liable in damages therefor in a specific amount and to require him to pay that amount out of his individual property. The former is a determination of the true state of the account of the assets of the estate between the executor and the estate, the latter is the adjudication of the liability of a person and of his individual property for a tort, or if the tort be waived, for a debt. The former was within the scope of the jurisdiction of the Michigan probate court because it was a determination, after due notice of its proposed action, of the state of the *res* that was the subject of the proceeding before it, the latter was the adjudication of a challenged cause of action in *personam* at common law.

A proceeding in a probate court to administer upon the estate of a deceased person is a proceeding *in rem* and not *in personam*. The property of the estate within the jurisdiction of the court is the defendant, the executor or administrator is its representative, all claiming any interest in that property under the deceased are parties to the proceeding, Grignon's Lessee v. Astor, 2 How. 319, 337; Sheldon's Lessee v. Newton, 3 Ohio St. 494, 503; Wilson v. Hartford Fire Ins. Co., 90 C. C. A. 593, 595, 164 Fed. 817, 819, and the

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only finding and decree which the Michigan probate court was empowered to make and that which it should have made in the case before it was an adjudication of the amount of the assets of the estate of the deceased that were in the hands of the executor Ferry or unaccounted for by him and an order that he pay or deliver them over to his successor in interest. The limit of its power was such an order and a proceeding for contempt for its disobedience, which would have been futile because the person of the defendant Ferry in Utah was beyond reach of the process of the Michigan court.

The decree that court rendered, however, was that Ferry, the individual, was personally liable for a devastavit in the sum of \$915,355.08, more than half of which was interest, and that he should pay this amount out of his individual property to the administrator de bonis non of the estate of his father. The Surrogate Court in the State of New York and the Orphans' Court in the State of New Jersey were authorized by statutes of those states to exercise the powers of courts of chancery over guardians, administrators and executors and to issue executions to enforce their decrees which by virtue of those statutes created the same liens and priorities as the judgments of other courts, and the cases of *Pyatt v. Pyatt* (N. J.) 18 Atl. 1048, 1049, and *Seaman v. Duryea*, 11 N. Y., 324, 329, which are cited and much relied upon by counsel for the complainant, arose under those statutes. They are not, however, authoritative in the case under discussion for the orders and decrees of probate courts in Michigan create no liens, and may not be enforced by execution. The only way in which

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those courts are authorized to compel obedience to their orders or decrees is by imprisonment for contempt and the fact that such a proceeding would be futile to compel obedience to an order that one should pay \$900,000.00 out of his individual property, since a commitment under such an order would constitute imprisonment for debt, and that the proceeding for contempt is only available to compel the payment or delivery of assets of the estate held by one in trust for the distributees is very persuasive that the decree of the probate court in this case was unwarranted. "It is true" said the Supreme Court of Michigan, "that probate courts are 'courts of record', being declared to be such by the constitution, but they are not 'courts of law' according to the ordinary use of that term. They derive their origin and their jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system. Parties cannot litigate questions of fact in them, except in the instance of probate of wills, or when the power of appointment is to be exercised." *Holbrook v. Cook*, 5 Mich. 225, 228. "The jurisdiction over contentious litigation belongs, under the constitution, to courts of law and equity." *Detroit, L. & N. R. Co. v. Probate Judge*, 63 Mich. 676, 30 N. W. 598; *Ferris v. Higley*, 20 Wall. 375. And the hearing and adjudication of the cause of action in *personam* against Ferry for the damages caused by his waste and conversion of the assets of the estate of his father was not within the scope of the jurisdiction of the probate court of Michigan.

Again, that court adjudged on the petition of residuary legatees and devisees of the estate of William

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M. Ferry that the defendant was individually liable to the estate for a devastavit in the sum of \$915,355.08, and that he should pay this amount to the administrator de bonis non, the Trust Company. But at common law an administrator de bonis non takes the goods, chattels and credits of the deceased which have not been administered only and all his property which has been mixed with that of the former executor or administrator, or which has been converted to his individual use, or into another form, in short all property of the deceased which does not remain in specie is administered and not unadministered property. The former executor is liable to creditors, legatees and distributees only for his conversion and waste of the assets of the estate and they may maintain suits against him therefor. He is not accountable to an administrator de bonis non for such mal-administration or for anything except the goods and personal property of the deceased in his hands in specie, and no court has jurisdiction to render decrees or orders against him for damages for delinquencies or devastavits in favor of a successor administrator unless expressly authorized to do so by the statute under which it acts. Beall v. New Mexico, 16 Wall. 535, 541; United States v. Walker, 109 U. S. 258, 260; Hanifan v. Needles, 108 Ill. 403, 407, 408; State v. Fidelity & Deposit Co., 100 Md. 256, 59 Atl. 735, 736; Carrick's Administrator v. Carrick's Executor, 23 N. J. Equity 364, 366; Donalson v. Lucas, 19 N. E. 758, 760; Potts v. Smith, 3 Rawle 361; Rowan v. Kirkpatrick, 14 Ill., 1, 8; Newhall v. Turney, 14 Ill. 338; Marsh v. People, 15 Ill. 284, 286; Coleman v. McMurdo, 5 Randolph 51; Bank of Penn. v. Haldeman, 1 Pen-

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rose & Watts, 161; Bell v. Speight, 11 Humph., 451 Swink v. Snodgrass, 17 Ala. 653; Slaughter v. Fronau, 5 T. B. Mon. 19; Gamble v. Hamilton, 7 Mo. 469. This was established and familiar law when the Michigan statutes were enacted but they granted no authority to an administrator *de bonis non* to recover from a former executor or administrator debt or damages for his conversions or delinquencies and gave no jurisdiction to the probate courts of that state to decree or order the payment of such debts or damages to him. The statutes of Illinois expressly provided that a *successory* administrator might maintain any appropriate action or proceeding against a removed executor or administrator for any waste, mismanagement of, or breach of duty with respect to, the estate, occurring during the latter's administration, Revised Statutes Illinois, 1874, Chap. 3, Sec. 39, and the Supreme Court of that State held that in the absence of such a statute an administrator *de bonis non* could not, while under it he might, sustain such an action. Hanifan v. Needles, 108 Ill. 403, 407, 408. No such provision has been discovered in the statutes of Michigan. On the other hand they leave the causes of action against an executor or administrator where the common law placed them, in the hands of the creditors, legatees and distributees of the estate. They limit by express terms the power of the probate courts of that state on the death or removal of a former executor or administrator to the grant of letters of administration "of the estate not already administered", Secs. 9318, 9332, and they provide one way only whereby the probate court may ever acquire any jurisdiction or control whatever over the debts or damages or the claims

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therefor caused by the neglect or mal-administration of an executor or administrator, and that method is by means of a plenary suit in another court upon his bond, brought, not by the administrator *de bonis non*, but by the judge of probate, (Sec. 9491. And they provide one way and one way only whereby the administrator *de bonis non* may ever acquire the control or possession of any of these debts or damages, and that is a method whereby he may acquire the proceeds thereof only after they have been collected by means of an execution issued on a judgment in an action brought by the probate judge in another court and a subsequent payment of the amount thus recovered to the administrator *de bonis non* under section 9496. Expressio unius est exclusio alterius. The prescription of this single exception to the common law rule upon this subject excludes all others and the conclusion that the Michigan probate court had no jurisdiction on the accounting to render any decree or order that the defendant Ferry should pay and the administrator *de bonis non* should recover from him the debt or damage resulting from his conversions, neglects and mal-administration, is logical and irresistible.

Counsel say, however, in answer to this proposition that where an administrator or an administrator *de bonis non* has recovered a judgment in one state he may maintain an action upon it in his own name in another jurisdiction and his title will be treated as surplusage, and this is true where the court which rendered the judgment had jurisdiction so to do. *Tal-mage v. Chapel*, 16 Mass. 71; *Lewis v. Adams*, 70 Calif. 403, 11 Pac. 833; 2 Black on Judgments, Sec. 922. But no summons or notice was ever served on

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the defendant warning him that any claim that the Trust Company as administrator de bonis non or otherwise was entitled to recover damages for his mal-administration of the estate of his father, would be considered or adjudicated by the probate court in Michigan, no cause of action on behalf of any such administrator was pleaded or suggested in the petition to which his attention was called, the findings and decree of the probate court are that the defendant's indebtedness therefor is to the estate of the father while the order of the probate court that this debt be paid to the Trust Company rests upon no cause of action pleaded and hence it was beyond the jurisdiction of that court and void. *United States v. Walker*, 109 U. S. 258, 265, 267. That portion of an order, judgment or decree of a court that has jurisdiction of the subject-matter and the parties to a controversy which is in excess of that jurisdiction is as futile as an entire decree without any jurisdiction. *Ex parte Lange*, 18 Wall. 163; *Bigelow v. Forrest*, 9 Wall. 339; *Day v. Micou*, 18 Wall. 156; *Foltz v. St. Louis & S. F. Ry. Co.*, 8 C. C. A. 635, 639, 60 Fed. 316, 320.

Nor is this all. The effect of the adjudication of the probate court of Michigan if authorized must be to deprive the defendant of property worth more than \$900,000.00 situated in the State of Utah, if he has that much property there. The fifth amendment to the Constitution of the United States forbids such a deprivation without due process of law. What constitutes due process of law is a question which it is the duty of the national courts to exercise their independent judgment to decide when it is properly presented for their decision, notwithstanding the requirement of

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the constitution that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. State laws and decisions may not determine for the federal courts what shall be deemed sufficient process of law, sufficient service of process or sufficient appearance of parties. *Insurance Company v. Bangs*, 103 U. S. 435, 439; *D'Arcy v. Ketchum*, 11 How. 165, 176; *Pennoyer v. Neff*, 95 U. S. 714, 722, 723.

Due process of law must give to the defendant "notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained." *In re Rosser*, 41 C. C. A. 497, 502, 101 Fed. 562, 567; *In re Wood and Henderson*, 210 U. S. 246, 254. The nature of the claim against the defendant which the Michigan probate court sustained and decreed was a claim against his person and his individual property for the waste and conversion of property of the estate of his father, and the relief sought from that court if the claim was sustained was that he should be adjudged to be personally liable for and should pay out of his individual property more than \$900,000.00 to his successor in the administration of his father's estate. But there was no notice or warning of any such claim or that any such relief would be sought if the petitioner's prayer was granted, either in the petition on which this claim was adjudged or in the notice thereof which was published and served upon the defendant. Petition and notice alike were limited to the issues whether or not the defend-

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ant should be removed as executor, whether or not he should be ordered to account for the unadministered assets of his father's estate, the true state of that account, and whether or not the Trust Company should be appointed administrator *de bonis non* in his place. The adjudication of these issues did not involve the determination of the defendant's personal liability for waste and mal-administration. The claim of that liability and the issue arising upon it were beyond the scope of the jurisdiction of the probate court in the proceeding before it which extended only to the administration and disposition of the assets of the estate of William M. Ferry, no notice that this claim and issue would be considered or adjudicated was given by the petition of the legatees or by the notice that was published and served upon the defendant, and that court never acquired any jurisdiction to determine them. *In re Rosser*, 41 C. C. A. 497, 505, 101 Fed. 562, 570; *Fenton v. Garlick*, 8 Johnson's Reports 195, 196; *Munroe v. The People*, 102 Ill. 406, 411, 412; *Hanifan v. Needles*, 108 Ill. 403, 410, 411. In the case last cited the statutes gave authority to the county court to require the executor to settle his accounts as executor and if he failed to do so to deal with him as for a contempt and to remove him. The court gave him notice to appear "and present his accounts of said estate for settlement as said executor", he failed to do so and the court removed him. The Supreme Court of Illinois held that the county court had no jurisdiction to make the order of removal and that it was void because no notice that the court would hear or consider the question of his removal was given to the executor. *In Munroe v. The People*, 102 Ill.,

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406, 411, 412, that court held that an order of the county court that the administratrix be removed based on an order to show cause why the administratrix should not pay an allowed claim without notice of possible removal or revocation of her letters was "absolutely void for want of jurisdiction in the county court to act."

At the request of the trustee a referee in bankruptcy required Roser, a bankrupt, to submit to an examination under Sub-division 9, Section 7 and Section 21 of the Bankrupt Act. He and other witnesses appeared and testified, the referee found that he had received and failed to account for or to schedule \$2500.00 which was a part of his estate and without any further notice that such an order was contemplated ordered him to pay it over to the trustee. Proceedings for contempt based upon this order and the failure of the bankrupt to comply with it were set aside by this court and the order was adjudged to be void because the bankrupt never had any notice of the presentation or hearing of the claim against him for this \$2500.00 until after the order for its payment was made. *In re Rosser*, 41 C. C. A. 497, 498, 504, 505, 101 Fed. 562, 563, 569. 570.

But perhaps the best illustration of the principle which governs this case is found in *Fenton, Administrator of Ramsdall vs. Garlick, Trustee of Garlick*, 8 Johnson's Reports 195. The word trustee in this case is used in the sense of the word garnishee in similar proceedings in the western states. Ramsdall, who had obtained a judgment against Samuel Garlick, brought an action in a court of general jurisdiction in the State of Vermont against Seth Garlick, as trustee of Samuel, wherein he alleged that Seth had in his possession

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money and personal property of Samuel of the value of \$300.00. Seth appeared and testified and the court adjudged that he had moneys of Samuel in his possession of the value of \$300.00 and after the death of Ramsdall ordered that his administrator have execution for his debt, damages and costs against the goods and chattels of Samuel in the hands of Seth. Such an execution was issued and returned unsatisfied. Meanwhile Seth had departed from the State of Vermont and taken up his residence in the State of New York. Thereupon the Vermont court granted a rule upon him that he appear at the next term of that court and show cause why an execution should not issue upon the judgment, against him and his own proper goods, chattels and estate. The rule was served upon him in New York and the Vermont court thereupon adjudged that the plaintiff should recover of Seth Garlick the amount of the judgment against Samuel Garlick and should have execution against the goods, chattels and estate of Seth. After the rendition of this judgment an action was brought by the administrator of Ramsdall in one of the courts in the State of New York and the Supreme Court of that State said:

“This was an action of debt on a judgment obtained in Vermont against the defendant, as trustee of Samuel Garlick. The judgment was in the nature of one founded on the suggestion of a devastavit committed by the defendant, in the character of trustee, and against such a charge he was entitled to be heard. The mere fact of his having formerly had assets or moneys of Samuel Garlick in his hands, was not sufficient to authorize a judgment against his own property, in his individual capacity, until opportunity

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had been given to him to show in what manner he had disposed of those assets. This opportunity he has never had; for, at the time he was called upon to show cause, by a rule in the nature of a writ of scire facias, he resided in this state, and the service of that rule upon him, while within this state, (which fact was admitted,) was void, not only upon general principles, but by the express words of our statute, passed the 10th of August, 1798. (Sess. 22, c. 3.) The judgment consequent upon such a service cannot be regarded by this court as the ground of a suit; nor will an action be sustained upon a judgment obtained in another state against an inhabitant of this state, without any personal summons or service of process. This was so decided in *Kilburn v. Woodworth*, (5 Johns. Rep. 37,) and in *Robinson v. Executors of Ward* (Ante, 86). The proceedings against the defendant, as trustee, in the year 1803, was not notice of any proceeding upon which this judgment was obtained, any more than a proceeding in the first instance, against an executor or administrator would be sufficient to warrant a judgment founded on a *devastavit*. The original suit, in both cases, is rather a proceeding in *rem*, than in *personam*. It is against the assets in the hands of the executor or trustee, belonging to the party whom they represent, and there must be a new suit, or a notice which is equivalent to it, before the trustee can be charged in his own private property or person, as for a breach of trust. There was no such new suit or notice to warrant the judgment in this case; and consequently, no action can be sustained upon it in this state. Agreeably to the stipulation of the parties, a judgment of *nonsuit* must be entered."

Because no notice of the nature of the claim against

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Ferry to the effect that he and his individual estate were liable for debts and damages on account of his waste and conversion of the assets of the estate of his father, or of the relief that was sought and obtained from the probate court of Michigan upon this claim was legally given to the defendant Ferry before the decree thereon was rendered, because the proceeding in that court was *in rem* and the adjudication of this personal claim for debt or damages was beyond the scope of the jurisdiction of that court in that proceeding and because that court was without power to adjudge in that proceeding that the Trust Company as administrator *de bonis non* or personally should recover that debt or those damages, the order and decree of that court that the defendant was individually liable for and should pay to the Michigan Trust Company, administrator *de bonis non* of the estate of William M. Ferry, on account of the *devastavit* found \$915,355.08, was beyond its jurisdiction and void and an action upon it cannot be sustained in any other jurisdiction. This conclusion has not been reached without consideration of the remarks of Mr. Woerner in Section 534, et seq., of his American Law of Administration and the opinions of the courts in *Pyatt v. Pyatt*, 18 (N. J.) Atl. 1048, 1049; *Seaman v. Duryea*, 11 N. Y. 324, 329; *Storer v. Freeman*, 6 Mass. 435, 439; *In re Estate of Wincox*, 85 Ill. App. 613; *Salomon v. The People*, 89 Ill. App. 374; *Lett. v. Emmett*, 37 N. J. Equity, 535; *Gray v. Gray*, 39 N. J. Equity 332, and other cases, in some of which damages for *devastavits* were considered and allowed in accountings in probate courts. But the question presented in this case does not appear to have been carefully considered and authoratively ruled under statutes and facts similar to those in the case in

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hand in any of these decisions, and so far as the opinions and practice in these and other cases are inconsistent with the conclusions which have been reached they fail to commend themselves to our judgment.

The argument of counsel for the plaintiffs that the guardian ad litem and next friend of the defendant appointed by the Michigan court and the attorneys employed with the approval of the Utah court by the general guardians of his person and of his estate in Utah by their appearance, their defense of the claims against Ferry and their presentation of the cross-petition in the Michigan court waived all objections to its jurisdiction and estopped the defendant from questioning it, has not been overlooked.

But the appearance of attorneys, guardians and next friends of a person, or even his own appearance in a court, to defend or prosecute a claim of which that court has jurisdiction, does not and cannot estop him from subsequently challenging the jurisdiction of that court to render a decree in that proceeding to which he never assented upon a claim of which that court never acquired any jurisdiction.

Moreover, the probate court of Michigan had no jurisdiction to appoint a guardian ad litem to defend, and the guardian ad litem it appointed had no authority to appear, to defend, or to submit to that court any claim of which that court had not previously acquired jurisdiction by lawful service of due process of law upon the defendant, *Galpin v. Page*, 18 Wall. 350, 365, 373; *Insurance Company v. Bangs*, 103 U. S. 435, 440, and no service of such process as gave that court any jurisdiction of the claim against his person and estate founded on the alleged *devastavit* had ever been made.

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For the same reason, the general guardians, the court in Utah and the attorneys they employed were without power to bind the person or to charge the estate of Ferry in Utah with this claim by their appearance in the Michigan court. The limit of their jurisdiction was over the person and property of the defendant in Utah and it was beyond their power to bind the former or to charge the latter by any appearance for them in or submision to a court which acquired no jurisdiction thereof, of any claim against either. They could not by their action in Michigan subject the person of their ward and client in Utah to arrest and imprisonment on the process of the Michigan court or his estate in Utah to decrees by that court upon claims of which it had not otherwise acquired jurisdiction, *Brown v. Fletcher's Estate*, 210 U. S. 82, 91; *Insurance Company v. Bangs*, 103 U. S. 435, 439, and the presentation by the next friend of the defendant of his claim that the powers of attorney and agreements of the residuary legatees presented a good cause why he should not render any account and entitled him to a decree closing the estate without such an account, constituted no appearance in the litigation over the claim for the devbastavit and no waiver of the defendant's right to maintain that the probate court of Michigan never acquired jurisdiction thereof. The decree of the court below was right, it must be affirmed, and it is so ordered.



In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE MICHIGAN TRUST COMPANY,
A CORPORATION,

vs.

Petitioner,

EDWARD P. FERRY,

Respondent.

No. 850.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION OF THE MICHIGAN TRUST COMPANY FOR A WRIT OF CERTIORARI.

As a preface to our brief we desire to state that in our opinion the only question before the Court at this time in the case at bar is whether it is a proper case for the issuance of the writ of certiorari. Any general discussion of the merits of the controversy, and of whether the United States Circuit Court of Appeals erred in its decision is, to say the least, untimely. While counsel for the petitioner recognize the soundness of this contention, they nevertheless have embodied in their petition and brief an elaborate argument upon the merits of the decision of the United States Circuit Court of Appeals. We thus are compelled, in the limited time given us, to reply to those arguments to

some extent, but we shall do so only briefly and in full confidence that if the occasion should ever arise we shall be allowed ample opportunity to be heard further upon the merits of the decision by additional brief and oral argument.

STATEMENT.

We first crave the indulgence of the Court in order to state certain facts in the case which, we believe, should be the only facts considered at this time.

This suit was upon an alleged money judgment obtained by constructive service in a probate court of Michigan against Edward P. Ferry, the respondent, a resident of Utah, and a mentally incompetent person under guardianship in the probate division of the State District Court of Utah, no property of the respondent being within the jurisdiction of Michigan, no voluntary appearance having been made by the respondent and no personal service having been made upon him in Michigan during the particular proceeding there. The United States Circuit Court for the district of Utah sustained a demurrer to the complaint and the United States Circuit Court of Appeals for the Eighth Circuit affirmed the decision of the lower court. The circumstances resulting in the rendering of the alleged money judgment were these: In 1868 the respondent, Edward P. Ferry, then living in Michigan, was appointed executor of his father's will by a probate court of Michigan. He filed two annual accounts, distributed a large amount of property of the estate and paid all the debts of the estate and the specific

legacies of the will, but as far as the records of the Michigan probate court disclosed in 1870, a residue of the estate then remained unadministered. (Transcript of record of United States Circuit Court of Appeals, page 12.) In 1878 Edward P. Ferry, the respondent, removed to Utah, where he has resided ever since. In 1892 he became mentally incompetent. In 1901 he was adjudged incompetent by the Probate Division of the Third Judicial District Court of Utah, and his sons were appointed guardians by that court of his person and property in Utah, and have since acted as such. In 1903, thirty-three years after Edward P. Ferry had filed his last annual account as executor in Michigan, twenty-five years after he had removed to Utah, and ten years after he had become incompetent, three of the surviving residuary legatees and the heirs of a deceased legatee filed a *petition* in the *Michigan probate court* *praying for an accounting by the executor, for his removal, and for the appointment of an administrator de bonis non*. A notice of this petition was regularly published in accordance with the Michigan statutes and a copy of the petition served on the defendant and his guardians *in Utah*. (Transcript of record of United States Circuit Court of Appeals, pages 2 and 3.) The Michigan probate court appointed a guardian *ad litem* to represent in that court the non-resident, incompetent executor. This guardian *ad litem* maintained in the proceeding in the Michigan probate court that Edward P. Ferry had fully accounted as executor to the legatees for the residue of the estate of his father and as an accounting to that court produced certain powers of attorney

and authorizations given by the original legatees in favor of the executor authorizing him to use the residue of his father's estate for the payment of certain indebtedness foreign to the administration of the said estate. The contention of the guardian *ad litem* was that the execution of these powers and authorizations was a settlement of the estate so far as the residuary legatees were concerned, and that if the petitioners in the Michigan probate proceeding were in a position to call Edward P. Ferry to an accounting it would be as trustee in an equitable action and not as executor in the Michigan probate court. (Transcript of record of United States Circuit Court of Appeals, page 10.) Stevens Guardian *ad litem* vs. Ottawa Probate Judge, 156 Mich., 526. Notwithstanding this defense the Michigan probate court proceeded from time to time and finally, four years after the filing of the petition of the legatees, in December, 1907, it rendered the alleged money judgment against Edward P. Ferry in the round sum of \$900,000, over half of which was accumulated interest for 37 years, which sum the probate court decreed was owing to the estate of his father by Edward P. Ferry personally. In this alleged judgment the Michigan probate court removed Edward P. Ferry as executor and appointed the Michigan Trust Company, the present petitioner, administrator *de bonis non*. (Transcript of record of United States Circuit Court of Appeals, page 15.) At no time since 1901 was Edward P. Ferry, the respondent, personally present within the state of Michigan. (Page 6, transcript of record of United States Circuit Court of Appeals.) The

guardian *ad litem* attempted to appeal from the alleged judgment of the Michigan probate court but failed in his appeal by not furnishing the bond required by the probate court. *Stevens Guardian ad litem vs. Ottawa County Probate Judge, supra, The Michigan Trust Company vs. Ferry, 175 Fed., Rep. 667.* (The opinion in the latter case now being part of the record in this proceeding.)

Thereupon The Michigan Trust Company brought suit in the Federal Court in Utah to enforce this alleged money judgment against Edward P. Ferry, with the result hereinbefore stated.

BRIEF OF ARGUMENT.

IS THIS A PROPER CASE FOR THE ISSUANCE OF A WRIT OF CERTIORARI?

We contend it is not. The grounds alleged in the petition for the granting of the writ are numerous, but they all properly may be included under three headings. (We shall arrange these headings in our own order to suit the purposes of our argument.)

1. *Because of the very great importance of this case to the parties and the amount involved therein.*

We dare say that this case is considered to be of very great importance to those whom the petitioner represents. By the same token may we not assume that any moving litigant in any suit treats his case seriously and as being of great importance to himself? We are not aware, however, that this Court takes matters of purely private concern, much less mere money matters,

into consideration in determining whether the writ should issue.

In the recently decided case of *Fields vs. United States*, 205 U. S. 292, the Court will recollect that the petitioner applied for a writ of certiorari to review a judgment of the Court of Appeals of the District of Columbia, sentencing the petitioner to five years' imprisonment. His personal liberty was doubtless dearer to him than the dollars demanded in this suit are to the persons for whom this petitioner is acting. Nevertheless Mr. Justice Brewer in denying the writ said in part:

"The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to the applicant, the question involved is not one of gravity and general importance."

2. *It is urged that the writ should issue because the case is of great public importance, in that as the case now stands it gives immunity and asylum in a foreign state to an absconding executor or administrator who has despoiled the estate he represents.*

In the first place, we contend that this case does not present that aspect. On the contrary, it presents the spectacle of an executor who has faithfully paid all the specific legacies and debts of the estate he has represented, and who has acted under at least some color of authority in disposing of the residue of that estate according to the written direction of the residuary legatees, being sued in the Michigan probate court by some of those surviving legatees after the lapse of 33 years, and after the executor has been a resident of Utah for 25 years.

and mentally incompetent for 18 years, and an alleged money judgment obtained against him in the Michigan probate court, without personal service ever having been made upon him. The case does not show an absconding executorial obtaining immunity and asylum in a foreign state. It shows the respondent a resident of Utah, not in hiding, no property of his sequestered, and his situation at all times publicly inviting any one who has a just claim against him to come and adjudicate its merits in the proper forum. It shows the respondent in Utah with his person and property in the custody of the Utah courts. It shows the residuary legatees waiting without excuse, for thirty-three years, until two of their number had died and until the respondent had become hopelessly insane. It then shows the surviving residuary legatees aroused to action in a jurisdiction foreign to the respondent's residence. These are circumstances which, we think, should commend themselves strongly to this Court in refusing to exercise its discretion. The merits of this so-called judgment of the Michigan probate court have never been reviewed by the higher courts of Michigan. The record shows that the guardian *ad litem* attempted to appeal from this so-called judgment, but failed. He applied to the appellate courts to have the amount of the appeal bond reduced, contending that the bond fixed by the Michigan probate judge was in such an excessive amount that it showed an abuse of discretion. That was the only question directly considered in the case of Stevens guardian *ad litem* vs. Ottawa, Probate Judge, 156 Mich., 526. We believe the opinion in that

case illuminates the question before this Court. In that case Grant, J., after stating that the merits of the accounting were not before the court, said in part, on page 532:

"Neither have we before us the testimony taken in regard to the 'powers and authorizations' and what was done under them, except the fact that shortly after they were executed, Edward P. Ferry, to whom the powers of attorney and authorizations were given, executed three trust deeds or mortgages for the benefit of the creditors of the parties named in the authorizations. These trust deeds or mortgages were properly recorded. The debts of the parties named therein were very large. It seems evident that the interest of the petitioners in the estate of William M. Ferry was devoted to the purposes mentioned in said authorizations with the full knowledge and assent of the parties thereto."

Again, on page 534, the opinion reads:

"The judge of probate in his return to the circuit court stated that the balance due from the executor exclusive of interest was about \$420,000, a sum considerably larger than that fixed by the inventory of the estate. Taking this as the amount of the property of the estate and deducting it from the total amount due it leaves \$800,473.00 as interest." * * *

"The position of the executor has been and still is that the execution of the powers and authorizations was a settlement of the estate so far as the residuary legatees were concerned, and that if the petitioners were in position to call Mr. Edward P. Ferry to an accounting, it is as trustee under those documents, and not as executor."
* * *

And on page 536, the court says:

"For thirty-five years the petitioners and legatees under the will of William M. Ferry took no steps whatever to compel an accounting or to procure the removal of the executor, notwithstanding they knew for many years that he was absolutely incompetent to manage any business and was broken down physically and to some extent at least mentally soon after his financial troubles in 1883." * * * (The italics are ours.)

"It may be a doubtful question whether the executor is liable for interest when legatees have authorized him to use their funds for the purposes mentioned in the 'powers and authorizations.' Upon this we intimate no opinion; it may furnish a good reason why a bond prohibitive of an appeal should not be required. A silence of thirty-five years or twenty years after the execution of the 'powers and authorizations', unexcused, with the knowledge of what was done thereunder, may furnish a reason why interest should not be charged, *even if the executor is liable to an accounting.*" (The italics are ours.)

"But these are questions which have been passed upon by the probate court and determined against the contention of the relator. The legislature has seen fit to commit to the discretion of that court alone the fixing of the bond in such cases. The appellate court can only determine questions of law upon an application to set aside the order so made."

There is certainly nothing in the opinion that would indicate that the Supreme Court of Michigan has decided that Edward P. Ferry is an absconding executor. It is an easy matter to charge one with a crime and it may be apparently safe to do so when the one against whom the

accusation is made has been civilly dead for eighteen years, and when the alleged criminal act is said to have been committed so long ago that the memory of many minds runneth not to the contrary. "The living can protect their own," counsel say. We thank counsel for teaching us that thought. It suggests the further observation that the grave cannot repel assaults upon character however atrocious they may be.

In the second place, in what respects does this case present a matter of public importance, even though we should admit the petitioner's accusation for the sole sake of the argument? It is a matter of common knowledge that trustees in charge of fiduciary funds very often leave the states of their appointment and establish their domiciles in other states. They often leave their trusts unadministered, or the beneficiaries dissatisfied with their administration. That does not entitle a beneficiary to sue a trustee in the state of his appointment and obtain a personal money judgment against the trustee without personal service on him or without his voluntary appearance in the proceeding. The remedy of a beneficiary in such a case is plain and adequate.

There has at all times been and still is a plain and adequate remedy for the real parties in interest in this action. The universal and well established practice under our system of jurisprudence where an executor or administrator removes to another state and is charged with having taken the property of his decedent with him, is to sue him in equity for an accounting in the state to which he has removed. Such

cases are numerous. (Lewis vs. Parrish, 115 Fed. 285, and cases cited therein.) But we have been unable to find in all the Federal and State decisions any other instance where a probate court has settled the accounts and thereupon rendered a money judgment against an insane, non-resident executor upon constructive service without jurisdiction having been obtained of his person or of his property and without his voluntary appearance in the proceeding. If we understand this Court's decisions it does not grant the writ when from the face of the record it is clearly apparent that the only result upon a review would be an affirmation of the decision of the lower court.

Re Lau Ow Bew, 141 U. S. 583.

Moreover, we cannot see where any matter of gravity and public importance exists. In very truth, the record discloses that the suit involves only a matter of private concern and *a family affair at that*.

3. *It is urged by the petitioner that the writ should issue because the decision of the United States Circuit Court of Appeals for the Eighth circuit conflicts with the statutes of Michigan and the decisions of the highest court of Michigan.*

We have made a thorough examination of the Michigan decisions, but have been unable to find any case decided by the Michigan Supreme Court which conflicts in even the slightest degree with the decision of the United States Circuit Court of Appeals in the case at bar. In fact, the decision of the Court of Appeals approves and is largely based upon the law as it exists in

Michigan. Neither have we been able to find any provisions in the organic law or in the statutes of Michigan which give the Michigan probate court the powers that this petitioner claims for that tribunal. (We have attached to this brief an appendix which contains the provisions of the Michigan constitution creating probate court, and the statutes of Michigan defining their powers. Reference will be made to this appendix.)

We shall not discuss the able and comprehensive decision of the United States Circuit Court of Appeals except very briefly, and only for the purpose of forming a proper premise for our further argument. The Court of Appeals, (Sanborn, Circuit Judge, speaking for the court,) decided:

1. That the Michigan probate court had jurisdiction to settle the executor's accounts and to remove him from office.
2. That it had no jurisdiction to render a money judgment against him personally for the following reasons:

That no court can render a money judgment against a defendant affecting his personal liability without personal service upon him or without his voluntary appearance in the proceeding. That the Probate Court of Michigan is a court of limited jurisdiction and derives its powers solely from the statutes; that under the powers granted the probate court, it proceeds *in rem*, and that it has no jurisdiction to render a judgment against an executor personally and against his individual property for his devastavit. That it had no jurisdiction to render a personal judgment against the executor for the further rea-

son that the petition and notice citing him to appear did not apprise him of the fact that the court would proceed to render such money judgment against him. That the notice simply stated that he appear and render his account for the unadministered assets of his father's estate, or in default thereof the court would remove him and appoint an administrator *de bonis non*. The Court further held that the Michigan statutes conferred no authority upon an administrator *de bonis non* to recover from a former executor damages for his conversions, and that the Probate Court had no jurisdiction to order the payment of such damages to the administrator *de bonis non*; that the former executor is liable only to creditors, legatees and distributees for his conversions, and it is they who may maintain a suit against him therefor.

The question that first suggests itself is,—wherein does this decision conflict with the decisions of the Supreme Court of Michigan? And incidentally, wherein does the decision disregard the statutes of Michigan relating to probate courts? In Holbrook vs. Cook, 5 Michigan, 229, the Court speaking of probate courts, said:

*** "They render no judgments; their determinations being called orders, sentences or decrees—and upon summary inquiry with or without notice as the case may be."

In Detroit, etc., R. R. Co. vs. Probate Judge, 63 Mich. 671, on page 680, the Court says:

"The Probate Court is a court which, although declared a court of record and having large and important powers, is nevertheless an inferior court subject to the review of the Circuit Courts and not designed or adapted to the exercise of

the ordinary judicial power in dealing with litigated questions affecting persons not subject to the exercise of prerogative jurisdiction and entirely *sui juris*. The jurisdiction over contentious litigation belongs under the constitution to courts of law and equity."

In *Hilton vs. Briggs*, 64 Michigan, 265, on page 269, the Court says:

"If the order for the payment of claims does not bind the administrator, neither does the order giving leave to prosecute the bond. That order does not fix the liability of the administrator. If it did, the subsequent suit would be worse than an idle ceremony, for it would uselessly impose upon parties and witnesses an expenditure of time and money, put the county to expense and impose labor upon the court for the mere purpose of establishing a liability which was already fixed. The legislature would never require this. If the liability were fixed it would be a very simple matter to authorize process from the Probate Court for its enforcement, but the order giving leave to prosecute the bond is an order which merely determines that it is proper under the circumstances that the claimant should be at liberty to show, if he can, in a court of law that the administrator and his sureties are under legal obligation to satisfy his claim or some part of it. It is in that court that the question of liability is to be tried and in that court the obligors in the bond are at liberty to meet any case that may be *prima facie* made out against them."

In *Schlee vs. Darrow*, 65 Mich. 362, the Probate Court made an order finding that the administrator was indebted to the plaintiff in the sum of \$612.00, and directing the administrator to pay this amount to the plaintiff within a specified time, and further providing that in default of

such payment the plaintiff might bring a suit upon the administrator's bond. A suit was accordingly brought on the bond. Here the finding or judgment of indebtedness by the administrator was united in the same order with the permission to bring suit upon the bond, but it was apparently no less an attempt at a judgment, because it happened to be thus united with another order. The Supreme Court of Michigan in reviewing the case, said: Pg. 375.

"So much of said judgment of both courts as attempts to fix the amount due from Berner (administrator) to Schlee and Stimpson (plaintiffs) in an application for leave to sue the bond is void. Upon such an application the Probate Court cannot pass upon the merits of the controversy which may arise upon the prosecution of the bond or fixed the liability of either principal or assured therein."

We are not unmindful of the ingenious theory advanced by counsel that a person once having accepted the office of executor and having submitted himself to the probate court, will continue to be under control of that court for all purposes and at all times and even though he has removed to a foreign jurisdiction, still the court may proceed against him without notice and render a money judgment against him if it so determines. The Supreme Court of Michigan has repudiated that theory. In *Hilton vs. Briggs, supra*, the Court says on pages 268-9:

"No person can have a personal obligation established against him in any judicial proceeding without an opportunity to be heard upon it. The suggestion made on the argument in this

court that the administrator is to be deemed at all times before the court and must at his peril take notice of its proceedings, is wholly inadmissible. No prudent person would accept the office as administrator under such a liability, and the assumption of presence if to be indulged at all would be a mere fiction of law. *But there must be a better foundation than a fiction of law for a personal judgment.*" (The italics are ours.)

The Michigan Probate Court is a court of limited jurisdiction and it can only exercise those powers which have been expressly conferred upon it by statute. *Grady vs. Hughs*, 64 Mich. 545. The constitution of Michigan creates probate courts. (Constitution of Michigan, Article VI, Section 1, see appendix.) The Michigan constitution also gives probate courts such jurisdiction, powers and duties as may be prescribed by law. (Constitution of Michigan, Article VI, Section 13. See appendix.) The compiled laws of Michigan of 1897, provide that a judge of probate shall have power to take the probate of wills, grant administration of estates of deceased persons who at the time of the decease be inhabitants or residents of the county or of those who should die outside of the state leaving the property within the county and appoint guardians for minors and others in the cases prescribed by law and to exercise all such powers and jurisdiction as may be conferred by law.

(Compiled laws of Michigan of 1897, Vol. 1, Section 650. See appendix); and in the following section, (651) it is provided that the judge of probate shall have jurisdiction in all matters relating to the settlement of estates

of deceased persons and minors and others under guardianship.

The Michigan statutes give the probate court power to remove an insane or non-resident executor. (Section 9317. See appendix.)

In Section 9347 (See appendix), it is provided that if an executor fails to render an account after notice, it shall be the duty of the judge of probate to remove the executor and appoint another person. In Section 9335 it is provided that the successor of an administrator may administer the estate *not already administered*.

In Section 656 it is provided that the judge of probate shall have power to keep order in his court, and to punish any contempt for his authority in like manner as such contempt may be punished in the Circuit Court.

In Section 682 (see appendix) it is provided that when costs are awarded to one party to be paid by the other, the said courts, respectively, may issue execution therefor, in like manner as is practiced in the circuit courts in other cases.

Section 9490 (see appendix) provides that when it shall appear, on the representation of any person interested in the estate that the executor or administrator has failed to perform his duty, the judge of probate may authorize the beneficiary, or any person aggrieved by such maladministration, to bring an action on the bond.

Section 9491 (see appendix) provides that if the executor refuses or omits to perform any order or decree for rendering an account, the judge of probate may cause the executor's bond to be prosecuted.

Section 9492 (see appendix) provides that in suits upon bonds the proceedings shall be in the name of the judge of probate.

Section 9493 (see appendix) provides that on application of any person authorized to commence a suit, the judge of probate may grant permission to prosecute the same.

These sections are all given in full in the appendix of this brief.

It will thus be seen that no power has been conferred by the constitution or the statutes of Michigan upon the probate court to render what is termed a money judgment. The Michigan probate court can settle an account of an executor and determine the amount due from him, but no statutory authority is given for the collection of the amount found due, except by suit on the executor's bond. No execution is allowed a probate court to enforce an order finding an amount due from an executor. The only execution that can be issued out of probate courts of Michigan is an execution for costs. An enumeration in the statutes of the methods of enforcing the decree or order of the Probate Court is a necessarily exclusion of other methods. *Expressio unius est exclusio alterius.* The petitioner could not have enforced this so-called money judgment by execution in Michigan. How then, can it be seriously contended that this alleged judgment should be given more faith and credit in Utah than it could ever possibly receive in the jurisdiction in which it was obtained? And wherein does the decision of the

Circuit Court of Appeals conflict with the probate law in Michigan†

The numerous cases cited by counsel for the petitioner are, in our opinion, not in point. There is not one Michigan case cited in the brief, or in the petition, which even faintly suggests that probate courts can not only settle the accounts of an executor, but can render upon that settlement a money judgment against him personally for the amount.

There is no provision in the Michigan statutes which allows an administrator *de bonis non* to sue a former executor for property already administered. Some jurisdictions have conferred this power upon the administrator *de bonis non* and the cases referred to in those jurisdictions consequently are not applicative.

Some space is devoted in the petitioner's brief to a discussion of the case of *Fitzsimmons v. Johnson*, 90 Tennessee 416. On pages 84-5 of the brief, a syllabus is quoted as being a syllabus in that case. We have been unable to find such a syllabus in the reported opinion. The controlling facts in that case are not referred to in the petitioner's brief. The Tennessee court held that although a personal judgment rendered in an original suit, by a court of original jurisdiction, upon notice by publication alone, without service of process or appearance, and without attachment of property, is absolutely void; this principle does not apply to personal judgments rendered by courts of appellate jurisdiction, pursuant to their mandates, where the cause has been removed into the appellate court by writ of error obtained

by publication alone, made as required by law and prosecuted to reverse the judgment of a court that had jurisdiction of all parties. A writ of error was held in this respect, not an original suit, but a mere continuance of a suit already properly begun.

Caldwell, J., in delivering the opinion of the Court, said in part on pages 426-7:

"In 1865 Goyer and Johnson submitted themselves to the jurisdiction of the Probate Court of Ohio, for the purpose of settling their accounts, and then obtained a judgment in their favor. That judgment was subject to review, and if erroneous to reversal by error proceeding in the Court of Common Pleas, to obtain such revision or reversal, it was incumbent on the complaining party to give Goyer and Johnson, or the survivor of them, notice. *****

"That constructive notice of a writ of error to a non-resident party, when such party was properly brought before the lower court, is sufficient to bind him by the judgment or decree rendered in the Appellate Court, was expressly decided in the case of *Nations v. Johnson*, 24 How. 195."

We take no issue with the principles announced in the foregoing decision. The case does not conflict with the decisions of Michigan, or with the decision of the Court of Appeals.

There is only one conflict of decision in this case, or more properly one might say a series of conflicts. The probate judge of Ottawa County, Michigan, has attempted to render a so-called money judgment or decree that conflicts with the decisions of the Supreme Court of Michigan, and with the decisions of the Supreme Court of the United States, and which, if given the credit claimed

for it, would override the statutes of Michigan and set at naught the fifth amendment to the constitution of the United States.

The case at bar presents merely a matter of private concern. The decision of the United States Circuit Court of Appeals for the Eighth Circuit, approves and confirms to the law established by the Supreme Court of Michigan, and in itself strengthens the vast uniformity of decisions throughout the states of the Union upon the questions involved.

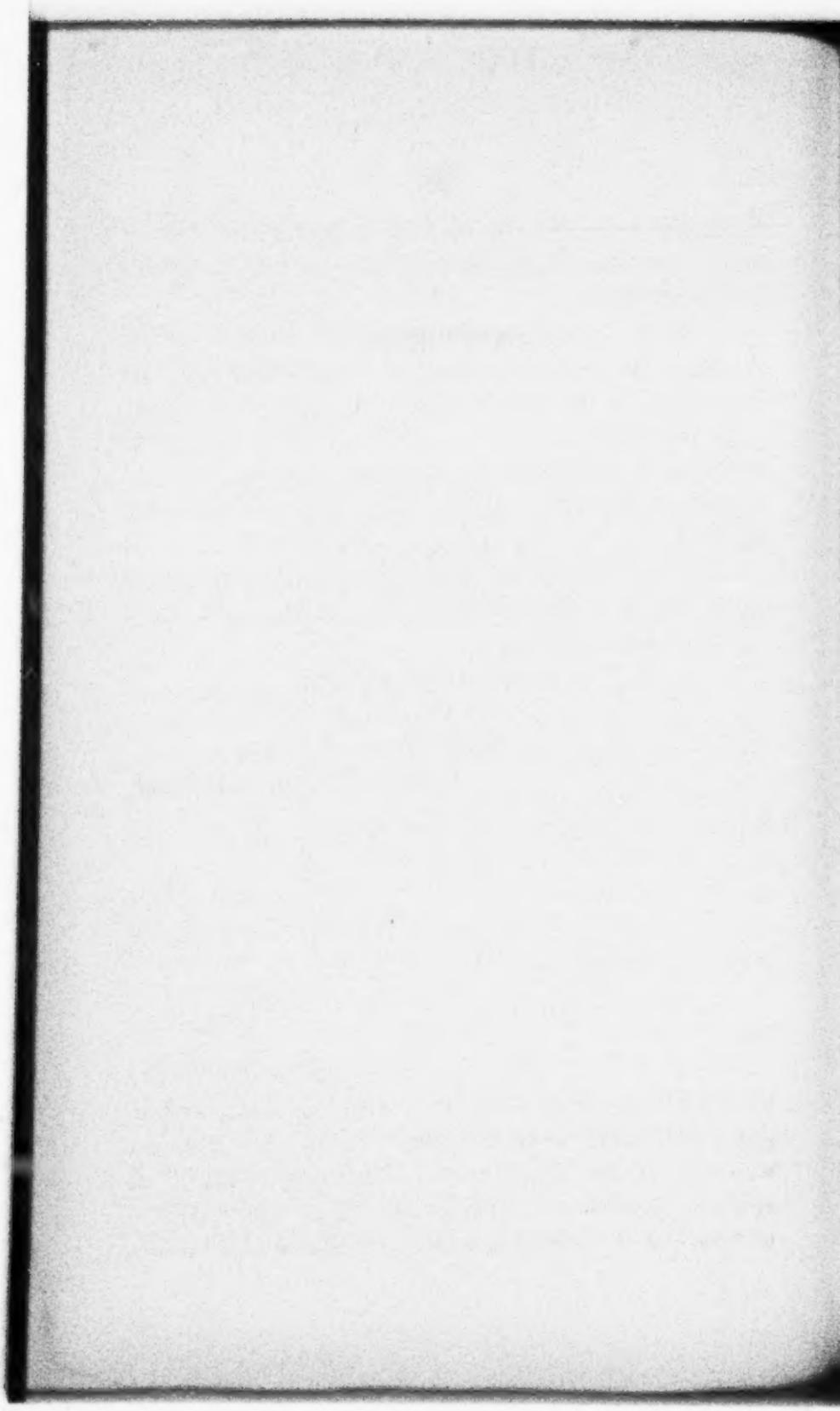
WHEREFORE, we earnestly contend that this is not a case in which this Honorable Court should reach forth its writ of review.

Respectfully submitted,

FRANKLIN S. RICHARDS,

EDWARD S. FERRY,

Attorneys for Respondent.



APPENDIX.

Provisions of the Michigan Constitution and the Michigan Statutes relating to the creation of probate courts and defining their powers.

CONSTITUTION OF MICHIGAN,

Article VI.

Judicial Department.

Section 1. The judicial power is vested in one supreme court, in circuit courts, in probate courts and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities.

Section 13. In each of the counties organized for judicial purposes there shall be a court of probate. The judge of such court shall be elected by the electors of the county in which he resides, and shall hold his office for four years, and until his successor is elected and qualified. The jurisdiction, powers and duties of such court shall be prescribed by law.

COMPILED LAWS OF MICHIGAN, 1897, Vol. 1, Section 650.

(650) Sec. 5. The judge of probate for each county shall have power to take the probate of wills, and to grant administration of the estate of all persons deceased, who were at the time of their decease inhabitants of, or residents in the same county, and of all who shall die without the state, leaving any estate within such county

to be administered; and to appoint guardians to minors and others in the cases prescribed by law, and shall have and exercise all such other powers and jurisdiction as are or may be conferred by law.

COMPILED LAWS OF MICHIGAN, 1897, Vol. 3.

(9347) Sec. 3. In case any such executor, administrator, or guardian shall fail to appear at the time and place specified in the notice, or to render to the judge of probate a satisfactory statement of his accounts, then it may be lawful, and shall be the duty of the judge of probate to remove such executor, administrator, or guardian, and to appoint some suitable person in his place, who shall give the same bonds, discharge the same duties, and be liable to the same penalties as is now provided by law.

Section 9335. (Sec. 15.) An administrator, appointed in the place of any former executor or administrator, for the purpose of administering the estate not already administered, shall have the same powers, and shall proceed in settling the estate in the same manner, as the former executor or administrator should have had or done; and may prosecute or defend any action commenced by or against the former executor or administrator, and may have execution on any judgment recovered in the name of such former executor or administrator.

COMPILED LAWS OF MICHIGAN, 1897, Vol. 1.

Section 656. The judge of probate shall have power to keep order in his court, and to punish any contempt

of his authority, in like manner as such contempt may be punished in the circuit court.

Section 682. When the costs are awarded to one party to be paid by the other, the said courts, respectively, may issue execution therefor, in like manner as is practiced in the circuit courts in other cases.

COMPILED LAWS OF MICHIGAN, Chapter 256,
Vol. 3.

(9487.) "Section 1. All bonds, required by law to be taken in or by order of the Probate Court, shall be for such sum, and with such sureties as the judge of probate shall direct, except when the law otherwise prescribes; and such bonds shall be for the security and benefit of all persons interested, and shall be taken to the judge of probate, except where they are required by law to be taken to the adverse party.

(9488.) "Sec. 2. A suit may be brought on the bond of any executor or administrator by any creditor, when the amount due to him has been ascertained and ordered by the decree of distribution to be paid, if the executor or administrator shall neglect to pay the same when demanded.

(9489.) "Sec. 3. Such a suit may be brought by any person as next of kin, to recover his share of the personal estate, after a decree of the Probate Court declaring the amount due to him, if the executor or administrator shall fail to pay the same when demanded.

(9490.) "Sec. 4. When it shall appear, on the representation of any person interested in the estate, that the executor or administrator has failed to perform his

duty in any other particular than those before specified, the judge of probate may authorize any creditor, next of kin, legatee, or other person aggrieved by such maladministration to bring an action on the bond.

(9491.) "Sec. 5. Whenever an executor or administrator shall refuse or omit to perform any order or decree made by a judge of probate having jurisdiction, for rendering an account, or upon a final settlement, or for the payment of debts, legacies, or distributive shares, such judge of probate may cause the bond of such executor or administrator to be prosecuted, and the moneys collected thereon shall be applied in satisfaction of such order or decree, in the same manner as such moneys ought to have been applied by such executor or administrator.

(9492.) "Sec. 6. In all suits upon such bonds, the writ and proceedings shall be in the name of the judge of probate, and when the action is brought for the benefit of any particular person as creditor, next of kin, or legatee, as provided in this chapter, the execution shall express that it is for the use of such creditor, next of kin, or legatee, and in such case the person for whose use the action is brought shall be deemed the plaintiff.

(9493.) "Sec. 7. On the application of any person authorized by this chapter to commence a suit on such bond, the judge of probate may grant permission to such person to prosecute the same, and shall thereupon furnish to the applicant, on his paying the legal fees, a certified copy of the bond, together with a certificate that per-

mission has been granted to prosecute it, and the name and residence of the applicant.

(9494.) "Sec. 8. If judgment shall be rendered for the plaintiff in any suit upon such bond, brought for the benefit of any particular person, the Court shall award execution for the amount due to such person, without costs of suit.

(9495.) "Sec. 9. If judgment shall be rendered for the plaintiff in any suit upon such bond, brought by the judge of probate for any breach thereof, in not performing any order or decree of the judge of probate, as mentioned in the fifth section of this chapter, execution shall be awarded for the full value of all the estate of the deceased that shall have come to the hands of such executor or administrator, and for which he shall not have satisfactorily accounted, and for all such damages as shall have been occasioned by his neglect or maladministration, with costs of suit.

(9496.) "Sec. 10. All moneys received on any execution issued on a judgment in favor of the judge of probate, as mentioned in the preceding section, shall be paid over to the co-executor or co-administrator, if there be any, or to such person, other than the defendant therein, as shall then be the rightful executor or administrator, and such moneys shall be assets in his hands to be administered according to law.

(9497.) "Sec. 11. Any person who may be injured by the breach of the conditions of such bond, may afterwards, from time to time, sue out and prosecute a *scire facias* in his own name, on the judgment which may have

been rendered for the penalty of such bond; and in such *scire facias* shall assign and set forth the breaches on which he relies, and may therein recover such damages as he may prove, with costs.

(9498.) "Sec. 12. Claims for damages on account of the breach of the conditions of any bond, may be prosecuted by any executor, administrator or guardian, in behalf of those he may represent, in the same manner as by persons living, and of full age, and such claims may be prosecuted against the representatives of deceased persons, in the same manner as other claims against such deceased persons."

IN THE
Supreme Court of the United States
OCTOBER TERM, 1910.

No. 850.

THE MICHIGAN TRUST COMPANY, A CORPORATION,
Petitioner,

vs.

EDWARD P. FERRY,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

STATEMENT.

This action was brought in the United States Circuit Court for the District of Utah by the petitioner against the respondent to recover \$915,355.08, with interest and costs, based upon the final decree of a Michigan probate court di-

recting the respondent to pay said sum and interest to the petitioner. Demurrer was interposed and sustained and on writ of error the judgment of the Circuit Court was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. A petition for rehearing was denied. The proceedings had in the Michigan probate court, and on which its decree was based, are stated in the petition filed herein, and are not here stated again.

SPECIFICATION OF ERRORS OR POINTS RELIED ON FOR CERTIORARI.

The alleged errors in the decision of the Circuit Court of Appeals and the grounds on which the writ of certiorari is prayed are fully stated in the petition therefor, but for the convenience of this Court the contentions of petitioner may be here again concisely stated with citation of some authorities, as follows:

I. Full faith and credit should be accorded by the courts of the United States to the final decree rendered in Michigan, and to the statutes and decisions of Michigan on which such final decree is based.

Forsyth vs. Hammond, 166 U. S., 506;
Stevens vs. Kirby, 156 Mich., 526;
Morford vs. Diefenbacker, 54 Mich., 593;
Robinson vs. Fair, 128 U. S., 53;
Grignon's Lessee vs. Astor, 2 How., 319.

This contention as applied to the final decree in question will be considered under the following subheads, affirmatively stating the propositions comprised in the corresponding assignments of error in the petition:

A. An executor when called to account by the probate court in Michigan, that being the court of his appointment, must render a true and correct account of *all* assets which have come to his hands as executor.

Comp. Laws Mich. (1897), Secs. 9428, 9429, 9430, 9435, 646, 647, 650, 651, 9345, 9436, 688, 9311, 653;

Const. Mich., Art. 6, Sec. 13;

Hall vs. Grovier, 25 Mich., 428;

Story on Conflict of Laws, Sec. 514b (7th Ed.);

Lewis vs. Parrish, 53 C. C. A., 77, 115 Fed., 285;

Vaughan vs. Northup, 15 Peters, 1;

Yonley vs. Lavender, 21 Wall., 276.

B. Assets which have come into the possession of the executor and which have been misappropriated by him are not, under the law of Michigan, "administered" assets.

Comp. Laws Mich. (1897), Secs. 9318, 9332, 9335, 9400;

Lafferty vs. People's Bank, 76 Mich., 35;

Hall vs. Grovier, 25 Mich., 428;

Brown vs. Forsche, 43 Mich., 492, 500;

Buss vs. Buss Est., 75 Mich., 163;

In re Sanborn's Estate, 109 Mich., 191;

Ward vs. Tinkham, 65 Mich., 695;

Campau vs. Gillett, 1 Mich., 416;

Hall vs. Cushing, 9 Pick., 395;

Ipswich Co. vs. Story Ex., 46 Mass., 310.

C. Due cognizance should be taken of the force and effect of the notice duly served personally and by publication on the executor by the probate court, fixing date for examination of his final account then before the probate court, together with the statements filed by the petitioners therein.

Stevens vs. Kirby, 156 Mich., 526;

McLean vs. Speed, 52 Mich., 257.

D. A proceeding for an accounting by the executor is inclusive of the making of an honest statement of the items with which he should be charged and credited, the striking of a balance, and the payment in full of that balance if against the executor.

Hall vs. Grovier, 25 Mich., 428;
 Pyatt vs. Pyatt, 46 N. J. Eq., 285;
 Seaman vs. Duryea, 11 N. Y., 324;
 Tudhope vs. Potts, 91 Mich., 490;
 In re Andrews, 92 Mich., 449;
 Loomis vs. Armstrong, 49 Mich., 521;
 Stevens vs. Kirby, 156 Mich., 526.

State vs. Williams, 77 Mo., 463;
 Mitchell vs. Moore, 95 U. S., 587;
 May vs. May, 167 U. S., 310.

E. The loss by reason of waste or maladministration was properly chargeable against the executor in his account; the charge for such loss, made in the statutory accounting proceeding, did not become a challenged cause of action *in personam* at common law, to-wit for *devastavit*, of which the probate court was without jurisdiction; and the decree was properly rendered against the executor individually.

Comp. Laws Mich. (1897), Secs. 9435, 670 (as amended);
 Loomis vs. Armstrong, 49 Mich., 521;
 Campau vs. Campau, 19 Mich., 116;
 Cheever vs. Ellis, 134 Mich., 645;
 Stevens vs. Kirby, 156 Mich., 526;
 Hall vs. Grovier, 25 Mich., 428;
 Gott vs. Culp, 45 Mich., 265, 275;
 McLean vs. Speed, 52 Mich., 257;
 Woerner, Sec. 534;
 Johnson vs. Powers, 139 U. S., 156;
 Prof. Schouler in 18 Cyc., 1187;
 Comp. Laws Mich. (1897), Sec. 9408;
 Basom vs. Taylor, 39 Mich., 682;
 In re Palm's Appeal, 44 Mich., 637;
 Comp. Laws Mich. (1897), Secs. 9443, 9444 (as amended);
 Clark vs. Fredenburg, 43 Mich., 263;
 Pierce vs. Holzer, 65 Mich., 263.

F. The balance, when found against the executor, is properly payable to the administrator *de bonis non* with the will annexed appointed in his place, and the decree properly directed such payment. Action on the executor's bond in the name of the judge of probate is not the only way in which the probate court may ever acquire any jurisdiction whatever over claims against the executor because of his neglect or maladministration.

Campau vs. Gillett, 1 Mich., 416;
 Storer vs. Storer, 6 Mass., 390;
 Wiggin vs. Swett, 6 Metc., 194;
 Butterick vs. King, 7 Metc., 20;
 Sewall vs. Patch, 132 Mass., 326;
 Minot vs. Norcross, 143 Mass., 326;
 Barlow vs. Nelson, 157 Mass., 395;
 Tallon vs. Tallon, 156 Mass., 313;
 Brown vs. Doolittle, 151 Mass., 595;
 Fay vs. Muzzey, 79 Mass., 53;
 Cobb vs. Muzzey, 79 Mass., 57;
 Cranson vs. Wilsey, 71 Mich., 356;
 Croswell on Executors, Sec. 180.
 Lafferty vs. Bank, 76 Mich., 51;
 Hall vs. Grovier, 25 Mich., 428, 432;
 Cole vs. Shaw, 134 Mich., 499;
 Comp. Laws Mich. (1897), Sec. 9334;
 Tyler vs. Wheeler, 160 Mass., 206;
 Amidown vs. Kinsey, 144 Mass., 587;
 Vaughan vs. Northup, 15 Peters, 1;
 Stevens vs. Kirby, 156 Mich., 526.

A decree directing payment to the administrator *de bonis non* is proper, especially when all claimants consent thereto.

Morris, Adm., vs. Morris, Adm., 4 Grattan (Va.), 293.

G. The rendition of that decree was not an attempt to deprive Ferry of property without due process of law.

Moore vs. Fields, 42 Pa. St., 467;
Fitzsimmons vs. Johnson, 90 Tenn., 416.

H. The probate court not only had jurisdiction of the executor from the time he accepted that office, and exercised it in calling him to account, but he himself invoked that jurisdiction when, by his next friend and attorneys, he filed his cross-petition, asking allowance of his accounts and that he be discharged as executor, as also when he offered proofs in support of his cross-petition, and when he sought to appeal from the decree.

Ingersoll vs. Harrison, 48 Mich., 234;
Kingsbury vs. Bucker, 134 U. S., 650;
Ferguson vs. Oliver, 99 Mich., 161;
In re Moore, 209 U. S., 490;
Sullivan vs. Andoe, 4 Hughes, 290; 6 Fed., 641;
Erwin vs. Ottawa Circuit Judge, 138 Mich., 271;
Lawrence vs. Nelson, 143 U. S., 215;
Stevens vs. Kirby, 156 Mich., 526;
Osborn vs. Bank, 9 Wheat., 738;
Hill vs. Mendenhall, 21 Wall., 453.

ARGUMENT.

We approach discussion of the grounds advanced for grant of writ of certiorari with full consciousness that the question at the threshold is not whether the Circuit Court of Appeals erred, but whether the case is one in which this Court will see fit, in its discretion, to exercise its undoubted power of review, if probability of error be shown. The position of this Court has been expounded in

Forsyth vs. Hammond, 166 U. S., 506,

where the court, through Mr. Justice Brewer, said:

"We affirm in this case the propositions heretofore announced, to-wit: that the power of this court in certiorari extends to every case pending in the circuit courts of appeal and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations demands such exercise."

We submit that, in the case at bar, the circumstances are such as to satisfy this Court of the importance of the questions involved, and that there is conflict between the Circuit Court of Appeals and the courts of a state. Under both aspects this case comes within the rule in *Forsyth vs. Hammond, supra*, and, irrespective of rule or precedent, discloses

a denial of full faith and credit so far-reaching in its consequences as to merit review by this Court.

The argument will be directed primarily to a consideration of the reasons urged why this Court should review this cause, and will thus mainly be confined to the decision of the Circuit Court of Appeals and to an endeavor to demonstrate the respects in which that decision is erroneous and why it should be changed by this Court. For convenience, the argument will be grouped under the heads and sub-heads above set forth.

I.

FULL FAITH AND CREDIT SHOULD BE ACCORDED BY THE COURTS OF THE UNITED STATES TO THE FINAL DECREE RENDERED IN MICHIGAN AND TO THE STATUTES AND DECISIONS OF MICHIGAN ON WHICH SUCH FINAL DECREE IS BASED.

To this general proposition there will be no dissent as applied to final judgments of state courts of general jurisdiction.

Cases supporting the full faith and credit doctrine are legion. Citation of them would be a mere parade of authorities more familiar to this Court than to us. The following instances will suffice:

Forsyth vs. Hammond, 166 U. S., 506, is in point, and this Court there declares:

"The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the federal courts. We may think that the Supreme Court of a state has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

Claiborne vs. Brooks, 111 U. S., 400, 410;
 Burgess vs. Seligman, 107 U. S., 20, 33;
 Bucher vs. Cheshire R. R. Co., 125 U. S., 555;
 Fitzsimmons vs. Johnson, 90 Tenn., 416.

The probate decree in question falls under the general rule. It meets every requirement of that rule, as will be noted in the following particulars:

(1) *Probate court jurisdiction of person and subject matter.*

The Circuit Court of Appeals decides that the probate court had jurisdiction, for some purposes, of the executor appointed by it and of the subject matter, and exercised its jurisdiction of the person in the statutory way, which was sufficient for those purposes. (Trans. p. 39.) This ruling was based upon the authorities there cited by it and is sustained by the following:

Comp. Laws Mich. (1897), Sec. 688;
 Munger vs. Judge of Probate, 86 Mich., 363, 369;
 Spencer vs. Houghton, 68 Calif., 82;
 Trumpler vs. Cotton, 109 Calif., 250;
 Vallee vs. Dumergue, 4 Exch., 290;
 (approved in) Pennoyer vs. Neff, 95 U. S., 714, 735;
 Bocquet vs. McCarthy, 2 Barn & Ad., 951;
 Copin vs. Adamson, L. R., 9 Exch., 345; 1 Exch.
 Div. 17;
 (approved in) Wilson vs. Seligman, 144 U. S., 46;
 Usry vs. Usry, 82 Ga., 198;
 Heisen vs. Smith, 138 Calif., 216;
 Lafayette Ins. Co. vs. French, 18 How., 404;
 Mutual Reserve vs. Phelps, 190 U. S., 147;
 Old Wayne Co. vs. McDonough, 204 U. S., 8;
 Moore vs. Fields, 42 Pa. St., 467, 473;
 Martin vs. Martin, 214 Pa. St., 389, 394.

We contend and shall endeavor to demonstrate in discussion under the appropriate subheads that such jurisdiction

and exercise extended to all purposes of the probate court decree.

(2) *Finality of its decree.*

It was a final judgment. There was no appeal or writ of error. It removed Edward P. Ferry as executor, thereby divesting him of an office and a title. It appointed a successor who, upon acceptance, became vested with both. It severed and terminated forever his official relation with the estate, and the Circuit Court of Appeals has rightly declared that the determination by the probate court was final and conclusive of these issues, as well as of his duty to account for "unadministered" assets and the true state of that account. In other words, the decree was final in so far as the Circuit Court of Appeals recognized the jurisdiction of the probate court. (Trans. p. 39.)

After rendition of the decree, the defendant sought to appeal, and, in mandamus proceedings brought by him to compel the probate judge to accept a nominal appeal bond, the Circuit Court of Ottawa County, Michigan, declared the decree to be final, and on certiorari was sustained therein by the Michigan Supreme Court.

Stevens vs. Kirby, 156 Mich., 526.

See also:

Shepherd vs. Rice, 38 Mich., 556;
Lewis vs. Campau, 14 Mich., 458;
Damouth vs. Klock, 28 Mich., 163.

(3) *General jurisdiction of the probate court and presumptions supporting its decree.*

The probate court was a court having jurisdiction of probate matters and settlement of estates, and in such matters was a court of general jurisdiction.

People vs. Wayne Circuit Court, 11 Mich., 393;
 Church vs. Holcomb, 45 Mich., 29;
 Alexander vs. Rice, 52 Mich., 451;
 Morford vs. Dieffenbacker, 54 Mich., 593;
 Schlee vs. Darrow Estate, 65 Mich., 362;
 Fingleton vs. Grove, 116 Mich., 211;
 Reason vs. Jones, 119 Mich., 672.

These decisions are so uniform that we quote from one only, where Chief Justice Cooley said in Morford vs. Dieffenbacker, *supra*:

"The probate courts of this state are courts of general, and for the most part of exclusive, jurisdiction in probate matters."

In view of these repeated holdings, the rule laid down in
 Robinson vs. Fair, 128 U. S., 53,

applies to the case at bar. There it is held that as the probate courts of California, by the decisions of the Supreme Court of that state, are courts of general jurisdiction in probate matters, a decree of such probate court will be presumed by the federal court to be correct, and every intent-
 ment will be indulged in its support.

In Grignon's Lessee vs. Astor, 2 How., 319,

it was held by this Court that a county court in Michigan (then the probate court) is a court of general jurisdiction whose judgment imports verity.

A court of general jurisdiction is presumed to act rightly.

Galpin vs. Page, 18 Wall, 350, 365;
 Hanley vs. Donoghue, 116 U. S., 1.

(4) *No fraud in procurement of the decree and no conflict with record.*

No fraud in the procurement of the probate court decree is even suggested, and no conflict with the record in that court was made to appear in the Circuit Court in Utah. The record was not before that court.

Here, then, was a final judgment of a state court of competent jurisdiction rendered in exercise of adequate jurisdiction of the person and subject-matter for some purposes, as the Circuit Court of Appeals decides, (and, as we contend, for all purposes) without fraud in the procurement, disclosing no conflict with the record, to which full faith and credit, as construed under the statutes and decisions of Michigan, was denied by the federal courts below in the following particulars:

A. AN EXECUTOR, WHEN CALLED TO ACCOUNT BY THE PROBATE COURT IN MICHIGAN, THAT BEING THE COURT OF HIS APPOINTMENT, MUST RENDER A TRUE AND CORRECT ACCOUNT OF *ALL* ASSETS WHICH HAVE COME TO HIS HANDS AS EXECUTOR.

The Michigan statutes are so clear and concise that a mere reading of their text should be convincing.

(References are to the Compiled Laws of Michigan, 1897. *Italics are ours.*)

Sec. 9428: "Every executor and administrator shall be chargeable in his account *with the whole of the goods, chattels, rights and credits of the deceased, which may come to his possession*; also, *with all the proceeds of the real estate which may be sold for the payment of debts and legacies, and with all the interest, profit and income which shall in any way come to his hands from the estate of the deceased.*"

Sec. 9429: "Every executor and administrator shall account for the personal estate of the deceased, as the same shall be appraised, except as provided in the following sections."

Sec. 9430: "An executor or administrator shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the personal estate; and he shall account for the excess, when he shall sell any part of the personal estate for more than the appraisal, and if he shall sell any for less than the appraisal, he shall not be responsible for the loss, if it shall appear to be beneficial to the estate to sell it."

Sec. 9435: "When an executor or administrator shall neglect or unreasonably delay to raise money by collecting the debts or selling the real or personal estate of the estate of the deceased, or shall neglect to pay over the money he shall have in his hands, and the value of the estate shall thereby be lessened, or unnecessary cost or interest shall accrue, or the persons interested shall suffer loss, the same shall be deemed waste, and the damages sustained may be charged against the executor or administrator in his account, or he shall be liable therefor on his administration bond."

Under these sections, the executor is clearly chargeable in his account with all personality which shall have come to his possession, with the proceeds of all realty sold by him, with all increase above appraisal, and with all profit and income which shall have come to his hands, and if through his neglect of duty loss is sustained by persons interested, this is deemed waste and the damages sustained may be charged against him in his account.

Such accounting must be had in the probate court which appointed him.

Article VI., Sec. 13, of the Constitution of Michigan provides:

"In each of the counties organized for judicial purposes there shall be a court of probate. * * * The jurisdiction, powers and duties of such court shall be prescribed by law."

Sections of Michigan statutes provide as follows: (All references are to Compiled Laws of Michigan, 1897.)

646. "Every judge of probate shall hold a probate court in his county. * * *."

647. "Every probate court shall be a court of record and have a seal * * *."

650. "The judge of probate for each county shall have power to take the probate of wills, * * * and shall have and exercise all such other powers and jurisdiction as are or may be conferred by law."

651. "The judge of probate shall have jurisdiction of all matters relating to the settlement of the estates of such deceased persons, * * *."

9345. "It shall be the duty of the judge of probate * * * to notify and require all persons appointed executor or administrator of any estate, * * * within his county, to appear at his office within one year from the date of their appointment * * * and at least once each year thereafter during the continuance of the administration * * * and at such other times as he may direct, and render unto him an accurate account of all moneys and other property in his hands as such executor * * * and the proceeds and expenditures thereof."

9435 (*supra* p. 13).

9436. "Every executor * * * shall render his account of his administration within one year from the time of his receiving letters testamentary * * * unless the court shall give permission to delay * * *; and he shall render such further accounts of his administration from time to time, as shall be required by the court, until the estate shall be wholly settled; and he may be examined on oath upon any matter relating to his account."

688. "When notice of any proceedings in a probate court shall be required by law, or be deemed necessary by the judge of probate, and the manner of giving the same shall not be directed by any statute, the judge of probate shall order notice of such proceedings to be given to all persons interested therein in such manner,

and for such length of time as he shall deem reasonable."

9311. "Every executor * * * shall give bond * * * with conditions as follows:

* * * * *

2. To administer, *according to law and to the will of the testator, all his goods, chattels, rights, credits and estate, which shall at any time come to his possession, or to the possession of any other person for him*, and out of the same pay and discharge all debts, legacies and charges, chargeable on the same, or such dividends thereon, as shall be *ordered and decreed by the probate court*;

3. To render a true and just account of his administration to the probate court within one year, and at any other time when required by such court;

4. To perform all orders and decrees of the probate court, by the executor to be performed in the premises."

Such bond was given by the executor. (Trans. p. 15.)

653. "The several judges of probate shall have power to issue all warrants and processes in conformity to the rules of law which may be necessary * * * to carry into effect any order, sentence or decree of the probate courts, or the powers granted them by law.

That the statutes refer to *all assets* we have directly in point:

Hall vs. Grovier, 25 Mich., 428;

There an administrator received money which in fact belonged to the estate of the decedent as he was reliably informed before rendering his final account. It was held to be no excuse for his neglect to charge it in his administration account in the probate court that at the time he so received it he did not know that it belonged to the estate, but supposed in good faith it belonged to the widow of the

decedent, for whom he received it and to whom in effect he turned it over.

On page 433, the Court, by Mr. Justice Graves, states:

"If the money, when Hall [administrator] received it, belonged to the estate, and if, before he rendered his account, he ascertained, or had reason to believe, that it was the property of the estate, it was certainly right that he should be charged with it in his account.

In contemplation of law it was still in his hands. His ignorance of the true title, if he was ignorant of it, when he received the money, had not led to its application under the trust in some way foreign to the legal destination, and no fact was shown or suggested, of a nature to excuse him as an administrator, from being debited with the amount."

On page 436, the Court further states:

"The object of a settlement is not merely to ascertain what items ought to be placed on the debit side of the administrator's account, subject to evidence on a future proceeding, that he ought not to have been charged therewith as between himself and the estate. Its scope is more comprehensive and complete.

The end to be accomplished is to judicially liquidate and settle the affairs of his trust, and determine the rights of the estate as against him, and his rights as against the estate, and the proceeding involves an adjudication upon each item. Parties interested may surcharge, or falsify the account, and the administrator may proceed by discharge, and defense. The dispute, if any, may turn upon the introduction and allowance of new items, or the allowance of old ones. Evidence may be produced on each side, so far as necessary, and when the hearing is closed, the court must adjudge what to allow and what to disallow, and settle the particular account. When the determination is made, the account adjudicated upon is settled on both sides."

The court in question was the probate court, and the

ruling laid down in that case was strictly followed by the probate court in the case at bar.

See also

Grovier vs. Hall, 23 Mich., 7, 10.

It is thus apparent that the probate court found full warrant in the Michigan statutes and decisions for doing what it did as recited in paragraphs Fifth and Sixth to Ninth, inclusive, on pages 4-7, of the Petition for Certiorari, and for finding in its decree that the estate had not been fully administered and "that it was and is the duty of said Edward P. Ferry to render a true and perfect account of his doings as executor, but that he has neglected and refused to do so." (Trans. p. 13.)

The Michigan doctrine is also in accord with that recognized by Mr. Story and by the federal courts, including this Court.

Story on Conflict of Laws, Sec. 514b (7th Ed.):

"It is not easy to perceive how he can be suable in such state [state other than that of his appointment] for such assets in his hands received abroad by him under the sanction of the foreign administration and by the authority of the foreign government to which he is thus accountable for *all such assets*."

In Lewis vs. Parrish, 53 C. C. A., 77, 115 Fed., 285, the court says:

"An executor or administrator is exclusively bound to account for *all of the assets* which he receives under and by virtue of his administration to the proper tribunals of the government under which he derives his authority."

This closely follows the leading case of

Vaughan vs. Northup, 15 Peters, 1,

where the Court, by Mr. Justice Story, at page 5, said:

"On the other hand, the administrator is exclusively bound to account for all the assets which he receives under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of other states have no right to interfere with or control the application of those assets according to the *lex loci*."

In *Yonley vs. Lavender*, 21 Wall., 276,

the Court said that an estate upon the death of the decedent

"was thereafter in the contemplation of law in the custody of the Probate Court, of which the administrator was an officer, * * *."

B. ASSETS WHICH HAVE COME INTO THE POSSESSION OF THE EXECUTOR AND WHICH HAVE BEEN MISAPPROPRIATED BY HIM ARE NOT, UNDER THE LAWS OF MICHIGAN, "ADMINISTERED" ASSETS.

Despite the clear tenor of the statutes and decisions cited in the foregoing subdivision (A) the Circuit Court of Appeals recognizes no jurisdiction of the probate court as to accounting by the executor except

"to adjudicate whether or not he should account for the unadministered assets of his father's estate, [and] the true state of that account." (Trans. p. 39.)

And that court further declares that in Michigan, as at common law,

"* * * property [of the deceased] which has been mixed with that of the former executor, or which has been converted to his individual use, in short all property of the deceased which does not remain in specie, is administered and not unadministered property." (Trans. p. 41.)

The same misapprehension permeates the entire opinion and seems to form the chief basis for the conclusions there reached.

It is disclosed in its comment upon the notice to the executor, as alleged in the amended complaint (Trans. pp. 35, 38, 44), and upon the following statutes:

9318. "When an executor shall die or be removed, or his authority shall be extinguished, the remaining executor, if there be any, may execute the trust; and if there be no other executor, administration, with the will annexed, may be granted of the estate not already administered." (Trans. p. 42.)

9332. "When any sole executor or administrator shall die, without having fully administered the estate, the probate court may grant letters of administration with the will annexed, or otherwise, as the case may require, to some suitable person, to administer the goods and estate of the deceased, not already administered."

These statutes should be read in connection with

9335. "An administrator, appointed in the place of any former executor or administrator, for the purpose of administering the estate not already administered, shall have the same powers, and shall proceed in settling the estate in the same manner as the former executor or administrator should have had or done; and may prosecute or defend any action commenced by or against the former executor or administrator, and may have execution on any judgment recovered in the name of such former executor or administrator."

Sec. 9400. "When an executor or administrator shall die or become incapable of discharging his trust, and a new administrator of *the same estate* shall be appointed, the probate court * * *."

The word "unadministered" made its first appearance in the amended complaint in reference to the order and notice served upon the executor as being, *inter alia*, to

"account forthwith to said court for the residue of said estate which was unadministered." (Trans. p. 2.)

The word had been used in its legal effect under Michigan jurisprudence and did not purport to give the order and notice verbatim. The copy of the decree attached to the amended complaint, and forming part of it, recited the petition as being

"for an accounting by said executor." (Trans. p. 9.) The order itself recited the petition as praying

"that he or his representatives be ordered to account forthwith to this court for the estate of said deceased down to the date of said accounting." (Trans. p. 57.)

It follows that the executor was not misled by the notice as to the scope of the accounting which was sought from him.

The Michigan statutes already cited demonstrate that the executor was bound to account in the probate court for all assets, and not merely "unadministered" assets, as the Circuit Court of Appeals construed that term, and we shall now submit authority to support our position that in Michigan no assets are "administered" until they are rightly administered.

Directly in point is

Lafferty vs. The People's Bank, 76 Mich., 35, where the Court, at page 50, declares:

"Under our statutes, the assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testator, and until it is fully administered, the probate court has jurisdiction in the matter of the proceedings, and in this case it was competent for the court to require the executrix to file a new bond and to remove her for failure to comply with the order."

This meaning of the word was so obvious that the Michigan Supreme Court made no citations in connection with its ruling.

Hall vs. Grovier, 25 Mich., 428, 432, the Court, speaking of a misappropriated asset, says:

"In contemplation of law it was still in his hands."

In Brown vs. Forsche, 43 Mich., 492, 500, the Court said:

"* * * The administrator fully administers when he allows them [distributees] to take it in the proper proportions."

In Buss vs. Buss Estate, 75 Mich., 163, the Court, at page 166, said:

"An estate cannot be held to be fully settled, and the executor's or administrator's duties as such closed, until he has paid the debts of the estate and the legacies provided for in the will, and filed with the judge of probate, in some form, evidence of these facts."

So also

In re Sanborn's Estate, 109 Mich., 191, where the Court says:

"* * * before the executor can discharge himself of his official responsibility, he must do some act to change the character of his holding, and show that the fund is placed safely where it ought to be. This question has been considered by the courts of many of the states, and this duty is recognized in the better reasoned of the cases in which the question has been raised. *In re Hood's Estate*, 98 N. Y., 363; *In re Higgins' Estate* (Mont.), 39 Pac., 506; *Hall vs. Cushing*, 9 Pick, 395."

In Ward vs. Tinkham, 65 Mich., 695,

the administrator invested funds of the estate in a lumber business, after receiving the consent of the widow thereto. The items were disallowed in his account, the court stating (p. 704) :

"The question which arises in the settlement of the final account of an administrator involves his official acts in collecting, controlling, and management of the estate, the *disposition of the proceeds, and the balance* on hand belonging to the estate awaiting distribution."

The Michigan probate system was taken from Massachusetts, and with it under the familiar rule was taken the construction placed by the Massachusetts decisions upon the statutes of that State.

Campau vs. Gillett, 1 Mich., 416.

In Hall vs. Cushing, 9 Pick., 395, the question was raised whether an executor who fails to invest proceeds of the sale of personal property would thereby render himself liable because of his having engaged to "administer according to the will" of the testator, and the report of the case, page 397, indicates that the executor himself conceded that :

"The duties of an executor are to collect the personal estate of his testator, convert it into money, pay debts, legacies and charges, and distribute the residue *according to the will.*"

In Ipswich Co. vs. Story, Exc., 46 Mass., 310,

Chief Justice Shaw said (p. 313) :

"It is not now necessary to consider the old rule, that a testator, by making a debtor his executor, released his debt. That rule has been qualified, to a great extent, in England, and has never been in force here. It is now understood, that when an executor or adminis-

trator was indebted to his testator or intestate, at the time of his decease, although the right of action cannot exist, because a man cannot sue himself, yet the debt is not considered as extinguished in any way, but rather to be accounted for as paid. *In other words, the debt becomes, prima facie, assets in the hands of the administrator or executor, to be accounted for and adjusted in probate account, as assets actually realized.* Wankford v. Wankford, 1 Salk., 299. Cheetham v. Ward, 1 Bos. & Pul., 630. Freakley v. Fox, 9 Barn. & Cres., 130. Winship v. Bass, 12 Mass., 199. Stevens v. Gaylord, 11 Mass., 267. It proceeds upon the ground that when the same hand is to pay and receive money, that which the law requires to be done shall be deemed to be done, and therefore that such debt due from the administrator shall be assets *de facto*, to be accounted for, in probate account. Such presumption would arise from the mere taking of administration."

See also Tarbell vs. Jewett, 129 Mass., 457, at page 461, *et seq.* and cases there cited.

Woerner, in his work on the American Law of Administration, Vol. I., page 9, says of administrators:

"The sum of their activity is called administration, which, in its narrowest legal sense, is the collection, management, and *distribution, under legal authority*, of the estate of an intestate * * *"

and then cites Webster, as follows:

"The term *administration*, in its primary significance and general sense equivalent to *conduct, management, distribution*, etc., is also applicable to the management of the estates of minors * * *."

And so in the Michigan statute (Sec. 9318) above cited, providing for grant on the death of a former executor or administrator, of "letters of administration of the estate not already administered," the meaning and construction of the phrase should be governed by the ruling in

Lafferty vs. The People's Bank, *supra*,

for if this statute has one meaning and construction in Michigan and another in Utah, if it has one meaning in the courts of Michigan and another in the courts of the United States, endless conflict and far-reaching injury to distributees and legatees must ensue.

The case of

United States vs. Walker, 109 U. S., 258,

cited by the Circuit Court of Appeals, does not seek to establish the general law, but confines its adjudication to the law as it existed at that time in the State of Maryland, for, says the Court:

"It may be conceded that the words 'unadministered assets,' as used in the statutes, have sometimes been construed to include the proceeds of assets sold or collected and not accounted for or paid over; and that an administrator *de bonis non* might call a removed administrator to account for such proceeds."

It should be borne in mind that this accounting in the probate court of Michigan was not in a suit by an administrator *de bonis non* against the former executor, but was the outcome of a petition by the residuary legatees and devisees calling him to account.

C. DUE COGNIZANCE SHOULD BE TAKEN OF THE FORCE AND EFFECT OF THE NOTICE BY THE PROBATE COURT, DULY SERVED ON THE EXECUTOR PERSONALLY AND BY PUBLICATION, FIXING DATE FOR EXAMINATION OF HIS ALLEGED FINAL ACCOUNT THEN BEFORE THE COURT, TOGETHER WITH THE STATEMENTS FILED BY THE PETITIONERS THEREIN.

As we read the opinion of the Circuit Court of Appeals, it entirely loses sight of two very significant features in the

probate court proceedings which are concisely stated in paragraphs Six, Seven and Eight, at pages 5 and 6 of the Petition for Certiorari.

The court below has held that the executor was properly before the probate court for some purposes. He was there represented by counsel, guardian *ad litem* and next friend, supporting his cross petition and participating in the trial which began in 1903.

One of these features was that in the course of that trial the probate court made its interlocutory order of 1905, requiring the executor to file a more detailed statement of account of his receipts and disbursements, including the disposition made of assets on hand at the date of his second annual account, and of any other assets not accounted for by him in that court. The executor resisted and refused to comply. Upon that refusal the probate court permitted the petitioners to put in further proofs showing his disbursements for the estate and the credits which should be allowed him.

The second significant feature is that after these proofs were in, the probate court in 1907 ordered notice to be given that, upon a day fixed, the account, as the petitioners claimed it to be, would be submitted to the court for examination and approval, and that petitioners would then apply for leave to charge, surcharge and falsify the alleged final account of the executor then before the court and to file amendments and objections thereto, and would then move the court for a final decree on the merits of said account. (Trans. pp. 10-11.) This order was duly published under the Michigan statutes (Secs. 688, 9346, 9441), and personal notice was also given the executor and his Utah guardians by personal service in Utah, all in precisely the manner which the Circuit Court of Appeals held sufficient in respect of the order and notice of 1903, made at the inception of the accounting proceeding. It was, therefore, of equal dignity and effective-

ness. It served to apprise the executor, as well as his counsel, guardian *ad litem* and next friend, who were conversant with all the proofs and knew the state of account resulting from them, of just what kind of relief would be sought from the executor, of the balance charged against him individually in "the account as the petitioners claimed it to be," and of the resulting individual liability of the executor under the Michigan statutes and decisions cited elsewhere in this brief.

On the day set, petitioners and counsel for the executor appeared, the procedure forewarned by the notice was followed, counsel for the executor was cross-examined, and the final decree was entered.

In Stevens vs. Kirby, 156 Mich., 526, the Supreme Court of Michigan declared that the proper procedure was followed, and that the probate court had power to settle the account in this way.

In McLean vs. Speed, 52 Mich., 257, Chief Justice Cooley said (p. 259) :

"It is a familiar principle that when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of * * *."

So also

In re Axtell, 95 Mich., 244.

The opinion of the court below recites the finding in the probate decree that the estate had not been fully administered, and that it was and is the duty of Edward P. Ferry to render a true and perfect account of his doings as executor, but apparently attaches no importance to these findings when reaching its conclusion that the account was confined

to assets "unadministered," as that word is defined in its opinion. If nothing else in the way of process had sufficed to bring a full accounting for all assets, whether converted or not, within the limits of the probate court statutory jurisdiction, service upon Edward P. Ferry, in the statutory way, of this order of March 6th, 1907, unquestionably sufficed, and the decree sued on was not rendered until December 31, 1907.

D. A PROCEEDING FOR AN ACCOUNTING BY THE EXECUTOR IS INCLUSIVE OF THE MAKING OF AN HONEST STATEMENT OF THE ITEMS WITH WHICH HE SHOULD BE CHARGED AND CREDITED, THE STRIKING OF A BALANCE, AND THE PAYMENT IN FULL OF THAT BALANCE, IF AGAINST THE EXECUTOR.

This statement would appear almost axiomatic were it not for the conclusions which the court below has reached, based on its erroneous impression of what constitute "assets unadministered" under the law of Michigan.

If that term be construed as the Supreme Court of Michigan construed it in

Lafferty vs. People's Savings Bank, 76 Mich., 35, 50,

then indeed the court below has recognized in terms, but denied in effect, the jurisdiction of the probate court to do just what it has done by its decree, viz: "to adjudge the true state of the account of the assets of an estate in the hands of an executor and to require him to pay or deliver them to his successor." (Trans. p. 39.)

But the court below has held in effect that as to any assets no longer *in specie* in the hands of the executor, he need not account in probate court, nor can he be compelled by the probate court to make good the deficit. His obligation under the statutes, the will, his oath and his bond, would be satisfied by a statement showing so much (in detail) re-

ceived, so much (in detail) duly expended or applied, and the residue converted to his own use. As to this residue no details, no "accounting," no reparation,—a palsy fallen upon the probate court.

However this may be elsewhere, it is not true in Michigan. That State recognizes an individual responsibility and liability of the executor in the court of his appointment for the due discharge of his solemn trust, the most sacred which can devolve upon man. The living can protect their own. The dead leave their estates to the protection of the proper tribunal, and that protection does not fail just where it is most needed, that is, where its officer, the executor, administrator or guardian, becomes delinquent or dishonest. In Michigan, as in many other states, an accounting means more than the filing of a written statement showing gaps in blank where the estate has been depleted. It not only includes the rendition of an itemized statement of debts and credits, but also the striking of a balance and the liquidation of that balance if it appears to be against the executor. The two words "account" and "liquidate" are virtually synonymous in such a proceeding, and here again directly in point is:

Hall vs. Grovier, 25 Mich., 428,

where the court, at page 436, states:

"The end to be accomplished is to judicially liquidate and settle the affairs of his trust and to determine the rights of the estate as against him, and his rights as against the estate, and the proceeding involves an adjudication upon each item."

(See further citation on pp. 15-16 of this brief.)

So also is

Pyatt vs. Pyatt, 46 N. J., Eq., 285,

directly in point. In that case a guardian had continued to manage his ward's property after the ward had attained full age, and it was urged that the orphan's court had no jurisdiction over matters occurring between the parties after the ward became of age. The court rejected this contention, holding that the orphan's court had jurisdiction over the entire account and that this jurisdiction included the power to ascertain what property of the ward remained in the guardian's hands at the time of accounting and to decree and enforce the surrender and payment to the ward of such remnant. The court quotes with approval a New York case as follows:

"In Seaman vs. Duryea, 11 N. Y., 324, the New York Court of Appeals, speaking of the jurisdiction of surrogate's courts, which had been granted by terms similar to those employed in our orphans' court acts, said: 'It was the intent of the legislature, in conferring this jurisdiction upon surrogates, to provide an inexpensive and summary process for the settlement and adjustment of the accounts of guardians, and to supersede the necessity of a resort to the court of chancery for that purpose. In other words, for all the purposes of settling accounts between guardians and wards, and finally adjudicating thereon, the surrogate's court was invested with all the jurisdiction which had before been exercised by the court of chancery, to be exercised, however, in the cases and in the manner prescribed by statute; and while surrogate's courts can only exercise the jurisdiction expressly conferred upon them, the statutes, being remedial and for the advancement of justice, should receive a favorable construction, and such as will give to them the force and efficiency intended by the legislature. * * * If the powers of the surrogate should be restricted to requiring the guardian to render an account of his doings, which may in a limited sense be held to be an accounting, or if it should be held that the surrogate is invested with power to examine the account rendered, allow and

disallow items, and finally adjust and settle the same, and strike a balance, without power to decree the payment of such balance, the remedy will come far short of that afforded by the court of chancery, and the legislature will have failed to provide the substitute they designed. The parties pursuing will be compelled to resort to another court by an independent action, to obtain the relief which before would have been had in one action. * * * The accounting to which a guardian may be subjected, by proceedings before the surrogate, is not only a statement of his receipts and disbursements, with the amount of the trust fund still remaining in his hands, but it is, in addition to such account stated, a rendering and giving up to the party entitled of the moneys and property in respect to which the accounting party is liable. *The payment is a part of the accounting.* The surrogate has authority to compel the guardian to account, which includes the payment of any sum which may be found in his hands, and necessarily implies power to make the necessary order or decree in the premises.'

"The good sense of these remarks is conspicuous, and they are as true in regard to our orphans' court, with its present powers, as to the surrogate's court in New York."

See also

Cushman vs. Richards, 100 Mass., 232-233;
State vs. Williams, 77 Mo., 463.

The Court below observes that the surrogate's court in New York and the orphans' court in New Jersey were authorized by statute to exercise chancery powers over guardians and administrators and to issue execution to enforce their decrees, which by virtue of those statutes created the same liens and priorities as the judgments of other courts, and declares that Pyatt vs. Pyatt and Seaman vs. Duryea are not authoritative in the case at bar because, as it says, the orders and decrees of probate courts in Michigan create

no liens and may not be enforced by execution. (Trans. p. 40.)

But it should be noted that the definition of the word "accounting" made in those two cases does not rest upon any statute.

In Pyatt vs. Pyatt, *supra*,

the New Jersey court first reviews the statutes which vest in the orphans' court full power to determine all controversies respecting allowance of accounts of executors and guardians, authorize it to issue process to compel such persons to account and to obey its orders, accord lien to its decrees for payment of money, and provide for issuance of execution thereon, and then says:

"This language, we think, imports that the orphans' court may require executors, * * * guardians * * * to render accounts of the estates committed to them, and may ascertain the condition of the estate in their hands, upon such accounting, as fully as can the court of chancery."

This is followed by reference to some decisions of the court of chancery, and the New Jersey court then adds:

"Another consideration leads to the same conclusion,"

and proceeds to cite from and comment upon Seaman vs. Duryea as to what is involved in an accounting. We have seen that the Michigan probate court has power to require such rendition of accounts.

Sec. 9345, p. 14, *supra*.

It also has in such matters full chancery powers.

Sec. 651. "The judge of probate shall have juris-

diction of all matter relating to the settlement of the estates of such deceased persons, and of such minors, and others under guardianship: Provided, however, that the jurisdiction hereby conferred shall not be construed to deprive the circuit court in chancery, in the proper county, of concurrent jurisdiction as originally exercised over the same matters."

The extent of this equitable power is seen in the fact that the administrator of one who has filled the office of executor or administrator may be held to account in probate court. It was so held in

Tudhope vs. Potts, 91 Mich., 490,

where, at page 493, the court said, with reference to this Sec. 651:

"The statute is broad and general in its terms; so much so that the legislature deemed it necessary to add the proviso saving the concurrent jurisdiction of circuit courts."

In re Andrews, 92 Mich., 449,

the court, at page 452, said:

*"Under our statute, probate courts have jurisdiction not only as to all matters relating to the settlement of estates of deceased persons, but as to the estates of minors and all others under guardianship. That jurisdiction embraces not only the appointment of guardians and the control over their official conduct, but the care and protection of the estate of the wards. Indeed, the grant of jurisdiction to probate courts is so general and extensive under our statute that to the section conferring jurisdiction the legislature added a proviso that such grant should not be construed to deprive circuit courts in chancery of concurrent jurisdiction. * * **

"Probate courts, with us, occupy the same relation to persons under guardianship as did courts of chan-

cery under the English system. They stand *in loco parentis*, in the place formerly occupied by the king, then by the chancellor, then by the court of chancery."

It can not be doubted that it was the intention of the Michigan legislature, no less than of the New York legislature,

"to provide an inexpensive and summary process for the settlement and adjustment of the accounts of guardians [executors] and to supersede the necessity of a resort to the court of chancery for that purpose."

The features of lien and execution seem immaterial in this connection. It does not appear that the executor, Ferry, had any property in Michigan which could be subjected to a lien or reached by execution.

But as to the powers of a Michigan probate court to issue warrants and process to carry into effect any of its orders or decrees, see Sec. 653, p. 15, *supra*.

It will be noted that the broad, equitable jurisdiction conferred upon probate courts by Sec. 651, *supra*, is, in terms, "of all matter relating to the settlement of the *estates* of such deceased persons." It is not confined to the settlement of accounts. No estate can properly be "settled" without delivery or payment to each of his due.

An instance where such payment was directed is found in

Loomis vs. Armstrong, 49 Mich., 521,

where the Court referred as follows to a probate court decree:

"Loomis, as heir at law of his deceased father, Henry Loomis, took measures to compel an accounting from Armstrong, the administrator, and in the probate court for Newaygo, a finding was made of a *balance due from the administrator* of \$1,454.81, which he was *ordered to pay over* to the widow and heir equally."

The court discusses fully the practice in regard to the rendering and settlement of accounts, and finds no fault with the direction to pay contained in the probate decree.

So also in other jurisdictions, "accounting" includes paying whatever is determined by that accounting to be payable.

In *State vs. Williams*, 77 Mo., 463,

the Court, at page 471, said :

"The learned counsel for appellants suggest that when the guardian charged himself with the ward's money obtained in Tennessee in his annual settlements that was a compliance with the conditions of the bond. The breach assigned in the petition being a failure, etc., 'to account for' this money. This is not all that is embraced in this term 'account for.' It is a condition not satisfied short of paying over the trust fund to the *cestui que trust*. *State ex rel vs. Coleman*, 73 Mo., 684; *State ex rel vs. Steele*, 21 Ind., 207."

In *Mitchell vs. Moore*, 95 U. S., 587,

Mr. Chief Justice Waite said :

"There is no specific prayer for the appointment of a new trustee or the payment of the principal of the fund to him when appointed; but such relief is necessary in order to carry into full effect an order for removal of the old trustees."

In *Stevens vs. Kirby*, *supra*, 156 Mich., 526,

counsel for Ferry had insisted that it was the duty of the probate court to render, in the first instance, a decree declaring simply the obligation of Ferry to account, and to so frame that decree as to make it final and appealable.

Counsel for the petitioners had contended that this would have been an unnecessary splitting of a cause of action into

two parts, resulting in multiplication of appeals. Our contention was that it was proper practice in the probate court to try and dispose of the whole matter upon the merits, and that the final decree should not merely determine the obligation of the executor to account, but that it should also state that account and determine how much was owing by him. In Stevens vs. Kirby, the Michigan Supreme Court upheld this view, which is tantamount to saying that the probate court had full jurisdiction to render such money decree.

Upon this point we cited, upon the argument, the following cases:

Eckfeldt's Appeal, 13 Pa. St., 171;
 French vs. Winsor, 24 Vt., 402;
 Wilcox vs. Wilcox, 63 Vt., 137;
 Palethorp's Appeal, 160 Pa. St., 315;
 Matter of Callahan, 139 N. Y., 51;
 Matter of Estate of Catherine Latz, 110 N. Y., 661;
 Sequin's Appeal, 103 Pa. St., 139;
 Succession of Veronique Carriere, 34 La. Ann.,
 1056;
 State *ex rel* Farmer vs. Judge Parish Court of
 Ouachita, 31 *id.*, 116.

Unless this practice were followed, it results, as stated by Chief Justice Gibson in Eckfeldt's Appeal, that a suit in the orphans' court would be the business of a lifetime. There is no question as to what has been the practice in the trial courts of Michigan in this regard. In the first instance, the accounting suit is tried in probate court and judgment entered for or against the executor, according as the balance upon the accounting may be owing to or by him. Appeal is then allowed to the circuit court, and there the trial takes place *de novo* upon the merits. If the appeal is taken by the executor, the amount of his bond on such appeal is prescribed by Section 670, as amended by No. 92, Public Acts of Michigan, 1901, (p. 38 *infra*). The issues are then framed

under the direction of the circuit court. Upon a disputed executor's account, it is quite common to there try the issues of fact before a jury, and then the judgment of the circuit court is certified to the probate court in order that it may be duly carried into execution. A writ of error lies from the supreme court to the circuit court to review the final action of the circuit court.

It would seem perfectly clear that the decisions of the federal courts below are due to the failure of those courts to understand the system of probate law existing in Michigan, they apparently being familiar with other and different systems under which much less power is vested in courts of probate.

And since in the case at bar, as the Circuit Court of Appeals holds, there was jurisdiction to remove the executor, then as is said in

Mitchell vs. Moore, supra, 95 U. S., 587,

there was also jurisdiction to enforce the payment of the sum due from that executor.

In May vs. May, 167 U. S., 310,

Mr. Justice Gray said:

"The direction in the decree that he should surrender possession and control of the trust property and all the leases and papers in his hands and all money, whether derived from the collection of rents or otherwise, was a necessary incident of his removal and the appointment of a new trustee in his stead."

See also

Salmon vs. People, 89 Ill. App., 374;
Salmon vs. People, 191 Ill., 290 (1901).

Since, as the Circuit Court of Appeals concedes, the pro-

bate court has power to direct the executor to account, and to remove him, it must of necessity, in view of the foregoing decisions, have power to direct that he liquidate and pay.

In Hanifan vs. Needles, cited in the opinion of the Circuit Court of Appeals, the executor was given notice "to present his accounts of said estate for settlement as said executor," and the court found that such notice did not give the court jurisdiction to consider the question of his removal. But it does not follow that the Hanifan case is authority for the proposition that if an executor is cited into court to be removed, he cannot be made to account.

Wilson vs. Hartford, and cases there cited, which were also cited in opinion below, are neither similar to nor precedent for the case at bar. They do not involve the calling of an executor to account.

E. THE LOSS BY REASON OF WASTE OR MALADMINISTRATION WAS PROPERLY CHARGEABLE AGAINST THE EXECUTOR IN HIS ACCOUNT; THE CHARGE FOR SUCH LOSS, MADE IN THE STATUTORY ACCOUNTING PROCEEDING DID NOT BECOME A CHALLENGED CAUSE OF ACTION *IN PERSONAM* AT COMMON LAW, TO-WIT: FOR *DEVASTAVIT*, OF WHICH THE PROBATE COURT WAS WITHOUT JURISDICTION; AND THE DECREE WAS PROPERLY RENDERED AGAINST THE EXECUTOR INDIVIDUALLY.

In Loomis vs. Armstrong, 49 Mich., 521 (*supra*), the Court, at page 526, says:

"The object of obtaining and closing an administrator's account is to place on record an exact showing of the assets *which he has had*, and of their *disposal* and of the *resulting balance*. And among the charges must be included such amounts, if any, as the estate has lost through his misconduct or default."

In Campau vs. Campau, 19 Mich., 116,

the Court, speaking of the statute Sec. 9435 (*supra*, p. 13), says, at page 125:

"And by Section 2984, Compiled Laws [Now Sec. 9435], if he should neglect or unreasonably delay to apply for license to sell the real estate in a proper case, he would *become personally liable for all loss * * **."

Section 670, as amended by No. 92 Public Acts of Michigan, 1901, is irresistible as to the personal liability of the executor for the amount found due from him upon examination of his account.

"* * * * And in case any person appeals from the allowance and findings of the court upon the *examination of his account as executor*, administrator, guardian or trustee, the court may, in its discretion, fix the penalty of the bond in such sum as will cover the amount *found due by the probate court upon examination of such account*, in which case the bond and sureties thereon shall be *liable* to the amount of such bond for the *amount found due by the probate court* or the appellate court upon the final determination of such appeal, including the costs and damages awarded by such appellate court."

If a personal judgment were not rendered against the executor by the probate court at the time of the settlement of his accounts, what could be the meaning of this statute?

Cheever vs. Ellis, 134 Mich., 645, 648-649,

is also an authority in support of the right of the probate court to render a personal decree against Edward P. Ferry. There an accounting by an executor was pending in probate court. The question involved was, how much, if anything, should be charged against the executor for *devastavit*,

in that losses had come to the estate through an agent and that such losses were due to the negligence of the executor. The executor died and his administrator filed a bill in chancery, thus transferring litigation from the probate to the circuit court. On page 649, Chief Justice Hooker said :

"At the time this bill was filed, the final account of the executor had been filed, and the parties were engaged in taking proof relating thereto in probate court; the same having been interrupted by the death of the executor Gruner. Both parties seem to have been willing to transfer this accounting to the court of chancery, and, while we doubt whether this was a competent practice, if objected seasonably, the face of the bill probably shows jurisdiction; and, as it has not been questioned, we dispose of the case upon its merits."

The plain meaning of this language is that the probate court has full jurisdiction upon the executor's accounting to render a decree against him as for a *devastavit*, and that the power of the probate court in that behalf is so ample that it may properly be construed to be exclusive in a proceeding there pending, and remedy in chancery denied upon objection seasonably taken.

As to that part of the opinion of the Circuit Court of Appeals relating to the inclusion of interest in the decree, we must again refer to and rely on as directly in point :

Stevens vs. Kirby, *supra*, 156 Mich., 526;
Hall vs. Grovier, *supra*, 25 Mich., 428.

Here are decisions and a statute of Michigan which abundantly substantiate the propositions set forth in this sub-head (E), and they are in direct conflict with the opinion of the court below as to what is the law of Michigan.

The proceeding in the probate court of Michigan was not

an action in *devastavit*, nor even one in the nature of *devastavit*, but an application by the residuary legatees for an accounting in the pending and undetermined proceeding entitled, "In the matter of the Estate of William M. Ferry, Deceased." Their petition and notice could not have been predicated upon even an alleged *devastavit*, for until the account was rendered, they could not tell whether waste had been committed, nor did they seek to collect damages therefor. They merely sought what the law of Michigan charged Ferry with having in his possession as executor.

The probate court had jurisdiction of the accounting. If Ferry, on the accounting, had satisfactorily accounted for every asset which had come to his hands, there could have been no balance struck against him, no decree that he was indebted to the estate in the amount of that balance, and no decree that he pay the balance and thus liquidate his account. If Ferry, on the accounting, had shown improvident expenditure or investment of estate funds, or failure to collect assets or income which he might have collected, whereby those interested in the estate had suffered loss, even though there had been no conversion to his own use, balance for the amount of such loss incurred through his fault would have been struck against him in accordance with the statutory provisions, and the decree would have charged him with that balance as a debt to the estate, directing him personally to pay it. Such jurisdiction is not denied by the Circuit Court of Appeals. That the taking of an account is within the equitable, as well as the statutory, jurisdiction of the probate court is plain upon the authority of

Gott vs. Culp, 45 Mich., 265, 275.

It developed in the course of the taking of this account that there was a balance against the executor because of the misappropriation and conversion of assets to his own

use. Did the probate court, through the development of that fact, lose its jurisdiction and power to do as in the suppositious case, that is, to charge him with the balance of loss resulting from that misappropriation and conversion, decree that he was indebted in that amount to the estate, and direct the payment as a necessary part of the liquidation and settlement of the account? We are aware of no principle and no authority which ousts the jurisdiction of a probate court of an accounting as soon as the fact of misappropriation and conversion develops in the course of that accounting.

In *McLean vs. Speed*, 52 Mich., 257, 259,

the court said (as already cited on p. 26) :

"It is a familiar principle, that when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of * * * "

And so also in

The Matter of Axtell, 95 Mich., 244; and
Gott vs. Culp, supra, 45 Mich., 265, 275.

Woerner, in his work on the American Law of Administration, at Section 534, says:

"At common law, *devastavit*, or *devastaverunt*, is the name of a writ given to any person who has been injured in his rights in consequence of the misapplication or waste of the assets or property of an estate by one or more executors or administrators, whereby he or they have made themselves liable to answer for the damages out of their own estate. Remembering the simple and efficient method pointed out by statute in the several American States for calling executors and administrators to account, in the probate court, for all

property or assets of an estate which came into their hands, or which, by the exercise of reasonable prudence and diligence, might have been recovered by them, it becomes obvious that no necessity exists in America for a remedy of this kind. The accountability of executors and administrators to the probate court or in equity, as provided by statute, covers the whole ground. Under the American system, even the technical return of *devastavit* by a sheriff to an execution against a defendant executor or administrator is without application,—the decree of the probate or chancery court upon an accounting more effectually taking its place. As it rests upon an ascertained amount of assets,—either of property in kind, or of a balance in money, which is or ought to be in his hands,—the liability is necessarily a personal one, recoverable *de bonis propriis*, and binding upon his sureties. There is no occasion, therefore, to dwell upon the doctrine of *devastavit*; it has no application here, save that the name is still employed by judges and lawyers to designate the circumstances under which an executor or administrator is held personally liable for acts of negligence or conversion."

It is said by the Court of Appeals that this was a proceeding *in rem*, and therefore no personal claim could be made. Any person who has held the property of others in a fiduciary capacity, when called to account in the proper court, is there as an individual to respond in person for his dealings with what has been entrusted to him, whether as executor, administrator, guardian, trustee, receiver, assignee for benefit of creditors, custodian of public moneys, or otherwise.

On the other hand, the claim of an outsider, as, for example, of a creditor, is in a sense *in rem*, since under the systems of law obtaining in this country his recovery will be limited by the amount of the *res* available for payment of debts.

But even in such a case, this Court has expressed inde-

cision as to whether a creditor's claim should be regarded as *in personam* or *in rem*.

Johnson vs. Powers, 139 U. S., 156.

There is good sense as well as sound learning in the following statement of the matter by Prof. James Schouler:

"Probate allowances in favor of creditors or third persons are directed, not against the executor or administrator personally or his property, but against the assets of the estate in his hands. The matter of inquiry lies between the creditor or third person and the estate, and the executor or administrator has no personal interest or responsibility concerning it; but when it comes to a final settlement the whole contest if any is between the estate and the executor or administrator, and the result of the contest, if adverse to him, charges him personally and the judgment therefore should run not against the estate but against him."

18 Cyc., 1187.

As to the power of the probate court to direct payment, the following sections of the Michigan statutes are pertinent:

Sec. 9408. "Whenever a decree shall have been made by the probate court for the distribution of the assets among the creditors, the executor or administrator, after the time of payment shall arrive, *shall be personally liable to the creditors for their debts or the dividend thereon, as for his own debt*; or he shall be liable on his bond, and the same may be put in suit on the application of a creditor, whose debt or dividend shall not be paid, as above mentioned."

In Basom vs. Taylor, 39 Mich., 682,

Mr. Justice Marston, rendering the decision of the Court, says (p. 686):

"The statute speaks of and treats the action as one to be brought against them officially; it is to reach assets of the estate in their hands. The judgment to be recovered cannot exceed the amount of the assets as decreed by the probate court, and that court having made a decree for the distribution of the assets, it is binding upon the executor. *It thereupon becomes his duty as such executor to pay over the amount thereof, and failing so to do, he is, by the statute, declared to be personally liable therefor, as for his own debt.* This personal liability, however, does not sever and disconnect the claim from being one in fact against the estate. If a judgment is recovered and paid, it is charged as against the assets in his hands, and is so treated in the final settlement; otherwise the recovery and payment of judgments under this section, no matter to what amount, would not tend to diminish the assets, and still leave him liable, through the probate court, to account therefor."

And again on page 687:

"* * * and after the decree of the probate court ordering payment, I can see no good reason why suit might not be brought in justice's court, or an action of garnishee be commenced, were it not for the statute which takes from the justice his jurisdiction in such cases."

In re Palms' Appeal, 44 Mich., 637,

arose under the above statute, and it was held that, by force of the statute, the demand in question became a personal charge against the administrator and that he became liable for it as for his own debt. It was held that the debt was a valid claim against the estate of the administrator after his decease.

The probate court of Ottawa County, in its decree of Dec. 31, 1907, finds that the debts, funeral charges and expenses of administration have been paid, and directs Ferry to re-

tain one-fourth of the amount due the estate as his distributive share and directs payment of the residue of the estate to the Michigan Trust Company, appointed administrator *de bonis non*, as the person by law entitled to the same. This must be done in order that the estate may be finally closed by someone competent to perform that function, else how could estates ever be closed? Moreover, it must be done under the following statutory provisions:

Sec. 9443: "After the payment of the debts, funeral charges and expenses of administration, and after the allowances made for the expense of the maintenance of the family of the deceased and for the support of the children under seven years of age, and after the assignment to the widow of her share in the personal estate, or when sufficient effects shall be reserved in the hands of the executor or administrator for the above purposes, the probate court shall, by a decree for that purpose, assign the residue of the estate, if any, to such persons as are by law entitled to the same, subject, however, to the widow's right of dower, if there be a widow of the deceased entitled to dower, and her dower shall not have been assigned and set off to her."

Sec. 9444 as amended by Public Act No. 177, Laws 1903: "In such decree the court shall name the persons and the proportions or parts to which each shall be entitled; *and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any other person having the same or any part thereof, after the expiration of 60 days from date of such decree*, unless an appeal shall have been taken therefrom, in which case they shall have the same right immediately upon the final determination of such appeal."

In *Clark vs. Fredenburg*, 43 Mich., 263, 264,

it appeared that the probate court had passed on the executor's account and decreed that after payment of all debts, claims and administration charges,

"* * * there then was in the hands of the said executor, or for which he was liable to said estate, of the assets and *debt*s thereof, the sum of \$10,440.70 in money, and that \$4,000 thereof was"

bequeathed to the testator's widow.

It further appeared that the executor refused to pay this legacy and was insolvent, in consequence of which the probate court granted leave to the widow to sue the surety.

Chief Justice Marston said:

"No appeal has been taken from the order and decree of the probate court. * * * The decree * * * establishes the fact that the executor has *received* sufficient funds over and above all claims and charges against the estate to pay complainant's legacy in full * * *.

"That the probate court had jurisdiction in the premises *there can be no question*, and the decree so made is binding upon the executor, the complainant and all parties in interest. If dissatisfied therewith they had a remedy, but not having pursued this *the decree is conclusive* and cannot be attacked collaterally. * * * Under this decree it became the clear duty of the executor to pay over to the complainant her legacy, with the interest due thereon * * *."

Pierce vs. Holzer, 65 Mich., 263.

was an action by a surety on an administratrix's bond to subject real estate purchased by the administratrix with estate funds to payment of claims paid by the surety. In the opinion, Champlin, J., reviewing the proceedings below, says, p. 266:

"After making all allowances, the judge of probate found that she had in her hands belonging to the estate, subject to distribution among creditors, the sum of \$755.71. He also found that the unpaid indebtedness amounted to \$2,082.75, and that she should pay

to each creditor 36.28 per cent. of his claim; and thereupon, on the 30th day of December, 1876, made an order that the \$755.71 should be distributed to the creditors within sixty days from that date."

And again, on page 269:

"No fault is found with this account, and no fraud, omission, error, or concealment is charged in the bill of complaint against it. The amount found by the judge to have been in her hands must stand as the true *amount due from her to the estate*."

Judgment was awarded against the administratrix personally and in favor of the surety.

See also

Loomis vs. Armstrong, *supra*, 49 Mich., 521.

Moreover, the probate court decree itself refers to the fact that the earlier decision of the cause had been restrained by certain proceedings for mandamus in the Circuit Court. (Trans., p. 11.) Those proceedings were brought on behalf of the executor to compel the probate court to make an order final and appealable in form, determining merely the question whether the executor was liable to account for the estate coming to his hands, but that it be restrained from specifying any amount due from the executor to the estate or to the residuary legatees. In other words, it was sought on behalf of the executor to prevent, by writ of mandamus, the rendition of a money judgment.

On November 22, 1907, the Circuit Court dismissed the petition on the ground that the several matters sought to be controlled through mandamus from the Circuit Court were matters entirely within the power and discretion of the probate court.

E. THE BALANCE, WHEN FOUND AGAINST THE EXECUTOR, IS PROPERLY PAYABLE TO THE ADMINISTRATOR *DE BONIS NON* WITH THE WILL ANNEXED APPOINTED IN HIS PLACE, AND THE DECREE PROPERLY DIRECTED SUCH PAYMENT. ACTION ON THE EXECUTOR'S BOND IS NOT THE ONLY WAY IN WHICH THE PROBATE COURT MAY EVER ACQUIRE ANY JURISDICTION WHATEVER OVER CLAIMS AGAINST THE EXECUTOR BECAUSE OF HIS NEGLECT OR MALADMINISTRATION.

A DECREE DIRECTING PAYMENT TO THE ADMINISTRATOR *DE BONIS NON* IS PROPER, ESPECIALLY WHEN ALL CLAIMANTS CONSENT THERETO.

In directing that the net balance found due from the executor be paid to the Michigan Trust Company as administrator *de bonis non*, the decree was in strict accord with the practice and procedure in Michigan. As has been stated, the Michigan probate statutes were taken from the statute books of Massachusetts.

In the year 1838, Chapter 98, of the General Statutes of Massachusetts, entitled "Of the Accounts and Settlements of Executors and Administrators" was made Chapter 5 of the Revised Statutes of Michigan, entitled "Of Executors and Administrators Rendering Their Accounts and Settling Their Estates." With those statutes came as necessarily incident thereto the decisions of Massachusetts constituting those statutes. It was so held in

Campau vs. Gillett, supra, 1 Mich., 416.

In the year 1810, Chapter 98 of the General Statutes of Massachusetts was in effect, and it was then that

Storer vs. Storer, 6 Mass., 390,

was decided. On that case the Michigan probate court relied in making its decree of December 31, 1907, directing

that payment be made to the Michigan Trust Company as administrator *de bonis non*.

In that case, Joseph died before completing administration of John's estate. Joseph had given administration bond to the judge of probate. Defendants, his administrators, settled Joseph's account as administrator in the probate court, showing a balance of \$627.14 due from Joseph to John's estate, and the probate court decree directed defendants to pay that balance to plaintiff, the administrator *de bonis non* of John. The balance was not paid, and the administration bond given by Joseph was put in suit against his administrators, the now defendants, for the benefit of plaintiff as administrator *de bonis non* of John, judgment was rendered in favor of the judge of probate as such, but no execution issued.

Then plaintiff, as administrator *de bonis non*, brought the present action of debt against Joseph's administrators, declaring on the probate court decree as on a judgment.

Defendants contended

"that no action lies on a decree of the judge of probate, the law having furnished another and better remedy by an action on the administration bond."

Parsons, C. J., in delivering the opinion of the court, said :

"* * * This action is maintainable by the plaintiff. When the decree passed he might have sued this action, if the defendant refused to obey the decree
* * *

"The judgment upon the administration bond is no bar to this action, being merely a cumulative remedy, * * * although there may be two remedies, there can only be one satisfaction. * * * There are cases in which an action on the bond may be the most effectual remedy. * * *

"After this opinion was given, the Court inquired why execution was not awarded in the suit upon the

bond; and it was said that, as the sum decreed was to be distributed when recovered, and as the defendants were entitled to a distributive share, execution was suspended until their proportion might be settled, and deducted from the amount of the decree in a new account.

"The Court then observed that there must have been some mistake or misapprehension; for the present plaintiff ought not to settle another administration account, charging himself with this balance, before he received it; and that the only *regular way in which a distribution could be decreed, was the payment of this balance to the plaintiff, and then a distribution of it, upon his charging himself with it in a new account.* But if the parties would agree, it might now be done by the entry of a special judgment."

A special judgment was thereupon entered.

The effect of this decision is that to decree payment by the executor to the administrator *de bonis non* is the "only regular way." It is on all fours with the procedure followed in the case at bar.

In Wiggin vs. Swett, 6 Metcalf, 194, the question raised was whether an administrator *de bonis non* is the aggrieved party and therefore entitled to appeal, and Chief Justice Shaw, at page 198, said:

"When, therefore, a sole executor dies, and an administrator *de bonis non* is appointed, the latter is the rightful administrator. The balance in the hands of a former administrator, *even when obtained by suit on the bond, is to be paid into the hands of the administrator de bonis non*, and shall be assets: *A fortiori*, when such balance is obtained without suit. Such an administrator has a direct interest in increasing such balance. So if the balance is in favor of the former administrator, and there is real estate, liable to be sold on license, by the administrator *de bonis non*, to pay such balance, he has a direct interest, as trustee for the legatees, to

diminish such balance. In other words, he becomes the sole representative of the estate, the trustee for all persons having an interest in it; and, as such, it is his province and duty to see that the account is settled correctly; he is aggrieved in his property if there be any failure to account for all that is due to the estate, and therefore may appeal."

In *Buttrick, Admr., vs. King, Admr.*, 7 Metc., 23, Chief Justice Shaw says:

"The administrator *de bonis non* of the husband is the proper person, we think, to take and administer the fund, because, if there should still be debts due from the testator, as there may be, notwithstanding the lapse of time, on covenants real, or the like, the creditors would be entitled to payment before the legatees. Otherwise, the administrator *de bonis non* will be bound to pay over to the legatees, according to the will."

To the same effect is

Sewall vs. Patch, 132 Mass., 326,

where the court, commenting on *Buttrick vs. King*, *supra*, states:

"This decision has been referred to and cited by the court repeatedly and no doubt has been expressed as to its soundness."

In *Minot vs. Norcross*, 143 Mass., 326,

Healy was appointed executor of Percival's estate and died many years afterward, not having rendered any account to the probate court, and his estate was insolvent. The administrator *de bonis non* of Percival was permitted to prove the claim for the proceeds of real estate sold by Healy before commissioners appointed on the insolvent estate of Healy. The court said:

"If Healy had commenced the execution of the will, had sold real estate under the authority given, and with

the proceeds in his possession had then resigned his office, or been removed therefrom, it could not have been necessary to appoint an administrator *de bonis non* to receive the personal property not administered, *and also* a trustee to receive the proceeds of the real estate. The whole of it—that which was originally personal, and that which had been lawfully converted from realty to personality by the authority of the will—was of the goods and estate not already administered."

In *Barlow vs. Nelson*, 157 Mass., 395, an action was brought by a residuary legatee because of the conversion by the executor of money and property of the testator. The court, by Lathrop, J., said:

"There is another difficulty in the plaintiffs' case. The action should have been brought by the administrator *de bonis non*, with the will annexed, of the estate of the testator. *Lawrence v. Wright*, 23 Pick., 128; *Buttrick v. King*, 7 Metc. (Mass.), 20; *Varnum v. Meserve*, 8 Allen, 158; *Sewall v. Patch*, 132 Mass., 326; *Minot v. Norcross*, 143 Mass., 326."

In *Tallon vs. Tallon*, 156 Mass., 313, action was brought by the legatee against the administratrix of an executor, and the court, by Chief Justice Field, said:

"But, as the administrator of the deceased executor is not charged with the administration of the first testator's estate, an action cannot be brought by a legatee for a legacy against him, even if he is liable as administrator of the executor to the administrator *de bonis non* of the testator for the property of the testator's estate which the executor has not accounted for, or has wasted or converted to his use."

In *Brown vs. Doolittle*, 151 Mass., 595, the court, by Justice Allen, said:

"As regards creditors, the decree allowing the account was not a settlement of the administration of the

estate, and the administrator remained liable to account for the whole amount of the inventory as assets, and it was his duty to pay over the assets of the estate to the administrator *de bonis non*, whose duty it was to collect them. *Wiggin v. Swett*, 6 Metc., 194; *Cobb v. Muzzey*, 13 Gray, 57; *Choate v. Thorndyke*, 138 Mass., 371. The appointment of the administrator *de bonis non*, to administer the assets which had nominally been accounted for, involves the invalidity of that account and settlement, and the necessity of a further accounting by the original administrator. If the whole estate is paid over, it will be held to pay expenses of administration, and the debt of Pennell, if it is established, and the balance to be distributed. The decree of the probate court ordered that the account should be opened, the credits disallowed, and that the \$9,000 and interest thereon be paid over to the new administrator. The opening and disallowance of the account would leave the original administrator liable to pay over the \$9,000, and make him and his sureties liable on his bond, * ”

The court then explains a method whereby it will not be necessary for the administrator to be ordered to pay over the entire sum, inasmuch as a large part of it was properly distributed by him.

In *Fay vs. Muzzey*, 79 Mass. (13 Gray), 53, at page 56, the court said :

“The chattels which were returned by the administratrix in her inventory must be accounted for by her. If it should appear that they had been delivered by her to her successor, the administrator *de bonis non*, that would discharge her from her liability. The fact that the chattels were in existence, and had not been sold by the administratrix, would make it proper for him to include them in his inventory. They belong to the estate, and remain to be administered, and the administrator *de bonis non* is entitled to receive them, *or to maintain a suit for their value against the administratrix.*”

Cobb vs. Muzzey, 79 Mass. (13 Gray), 57,

was an appeal by an administrator *de bonis non* from a decree of a judge of probate allowing the account of Elizabeth Muzzey, administratrix, who had credited herself with cost of repairs made to a public house of deceased and had retained rents paid by lessee. The right of the administrator *de bonis non* to enforce collection of sums erroneously allowed in administratrix' account, seems to be conceded, and the court said (page 58) :

"The court are of the opinion that the appeal of the administrator *de bonis non* must be sustained. * * *

In Cranson vs. Wilsey, 71 Mich., 356,

Armena Wilsey and James F. Mead were appointed and qualified as executors of David G. Wilsey. The probate court ordered a division of the property without requiring its conversion into cash, and some twelve years later David H. Rheubottom, one of the legatees under the will, petitioned the court for an account by the executor and for an order directing the filing of a new bond. The petition alleged, among other things, the insolvency of James F. Mead and a fraudulent disposition of Armena Wilsey's property. The executors were removed and one Eaton was appointed administrator with the will annexed and was granted leave to sue on the bond given by the former executors for their conversion of assets belonging to the estate. The court, at page 360, said :

"It is claimed, however, that this action was brought in the name and for the use of David Rheubottom, who has no definite interest. This is undoubtedly true, and the action should not have been for his use. But the leave was granted to the administrator, who is a proper party, and who is entitled to take the fund, and see that it is duly invested. Inasmuch as the judge of probate

is the proper plaintiff, we see no reason why the record should not be so amended as to make it show the administrator as the party in interest, and it will be so done."

See Croswell On Executors, Sec. 180, where the author states:

"If a balance is found due from the former executor or administrator to the estate, the judge of probate will make an order that that amount be paid to the administrator *de bonis non*; and upon that decree the administrator may have an action of contract against the outgoing executor or administrator, or his representatives, or he may have an action on his administration bond, against him or them or his sureties. He is not limited by election of one of these remedies, and he may sue on the administration bond, and get judgment, and then sue on the decree of the court."

The cases cited by the Circuit Court of Appeals in this connection (Beal vs. New Mexico, and others) are here again distinguishable from the case at bar. For instance, in that case all the parties interested were not before the court and could not have acquiesced in the rendition of the decree, while in the case at bar *all* parties having an interest in the estate were before the court, all claimants (except the executor himself) acquiesced in the decree, hence the reason in that case assigned for holding the decree in favor of the administrator *de bonis non* irregular and void is obviated here. In the case at bar all the persons interested were in court and the decree is therefore, if for no other reason, good. In this connection

Morris, Adm., vs. Morris, Adm., 4 Grattan (Va.), 293,

is directly in point.

In that case an action was brought by Rice Morris, as ad-

ministrator *de bonis non* of Samuel Morris, against Beverly Staples as administrator with the will annexed of Tandy Morris, the sureties of Staples and the distributees of Samuel Morris (Tandy Morris having been in his lifetime administrator of Samuel Morris), for an accounting by Tandy Morris, as administrator of Samuel Morris, and for a decree that Staples settle his own accounts and the accounts of Tandy Morris. There the court below decreed that the plaintiff, Rice Morris, as administrator *de bonis non* of Samuel Morris, should recover the sum of \$512.04, with interest, etc., against Staples, the administrator with the will annexed of Tandy Morris, and his sureties on his administration bond. The court, at page 343, said:

"So much of the decree as is in favor of the administrator *de bonis non* of Samuel Morris, deceased, is not objected to on the merits. Strictly, perhaps, it should have been in favor of the distributees, and not of the administrator, according to the cases cited in Wernick vs. MacMurdo. The other distributees who were parties do not complain, and as it clearly appears this debt was entitled to priority over all others, and there was a sufficiency of assets to discharge it, so much of the decree against Staples should be affirmed."

The court, at page 345, said:

"The court is further of opinion that there is no error in so much of said decree as ascertains the priority of the claim of Rice Morris as administrator *de bonis non* of Samuel Morris, deceased, to satisfaction out of the assets of Tandy Morris, deceased, and renders a decree in his favor for the amount ascertained to be due against said B. Staples, administrator with the will annexed of said Tandy Morris, deceased, and the securities of said Staples on his official bond; for, although said decree should in strictness have been rendered in favor of the distributees of said Samuel Morris, deceased, instead of his administrator *de bonis non*, yet as said distributees were parties to the suit, and have not

*complained, and being parties, a payment of the decree to the administrator *de bonis non* would be a valid discharge to the administrator of Tandy Morris, the irregularity is one which cannot prejudice him, and therefore one of which he cannot complain."*

In Lafferty vs. Bank, 76 Mich., 51,

the court, after declaring, on page 50:

"Under our statutes, the assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testator, * * *"

further says:

"But they hold it [personal property] in their official capacity as executors, and if they die, resign, or are removed, the assets undisposed of by them fall back into the estate of the deceased, and may be sued for and recovered by the administrator *de bonis non* with the will annexed."

This should also be read in connection with the decision by the same court in Hall vs. Grovier, 25 Mich., 432, as to an asset belonging to the estate, but misappropriated by the administrator:

"In contemplation of law it was still in his hands."

The Circuit Court of Appeals in its opinion states that an action brought in another court on the probate bond in the name of the judge of probate affords the *only* way in which the probate court could ever acquire any jurisdiction whatever for assets converted or misappropriated, and the only way in which the administrator could acquire possession of the amounts so recovered.

The statutory provisions cited by the court below in support of that holding are found in a chapter confined to and

entitled "Of Probate Bonds and the Prosecuting of Them." By these statutes the bonds run to the judge of probate, and action thereon must therefore be brought in his name. But anyone interested may obtain his certificate of leave to bring suit thereon against the sureties, and the amount so recovered from the sureties does not go to the party bringing the suit, but is turned over to the remaining or successive administrator and treated as assets in his hands. The amounts so recovered were never assets of the estate or proceeds of assets. They come from the sureties. Suit on a bond is unnecessary unless a suit is brought against sureties. The principal is liable, regardless of his bond and the sureties thereon. It may be well that the only way to *recover on the bond*, for delinquencies of the executor, is under this chapter, and thus *exclusio alterius*. But

Lafferty vs. Bank, 76 Mich., at pages 49-50,

is authority that parties interested are not confined to the remedy of suit on the bond, which might prove futile because of death, insolvency or non-residence of the sureties, and expressly defines the meaning of the word "administered" as used in probate statutes, including Sections 9318 and 9332, referred to in the opinion below.

In Cole vs. Shaw, 134 Mich., 499,

the widow qualified as executrix and gave a residuary legatee's bond in \$5,000, conditioned *inter alia* to pay all legacies. There was a legacy of an annuity to her husband's sister. The probate court, on petition of the executrix, but without notice, discharged the executrix and cancelled the bond, which was delivered up and removed from the files.

The legacy had not been paid. A year later the legatee filed her petition in probate court praying that the residuary legatee furnish a new bond or that an administrator be appointed to take charge of the estate.

Sec. 9334 is as follows:

"When an administrator shall be removed, or his authority shall be extinguished, the remaining administrator, if any, may execute the trust; if there shall be no other, the court of probate may commit administration of the estate not already administered to some suitable person, as in case of the death of a sole administrator."

The court construing this section held that an administrator *de bonis non* should be appointed.

The query arises, what could this administrator *de bonis non* take with which to satisfy the legacy, if the doctrine as laid down in the ruling of the Circuit Court of Appeals in the case at bar is to prevail? He could take only the estate not already administered, and that estate had seemingly vested in the widow. There was no bond on which he could bring suit in the name of the probate judge. The bond had been cancelled and delivered up. By necessary inference, the successory administrator had some means of getting from the widow enough to satisfy the sister's legacy, otherwise appointment of successory administrator would have been futile. This case is also interesting in that it cites with approval *Lafferty vs. Bank*, 76 Mich., 35.

The proper practice in Michigan, as adopted from Massachusetts, is to bring the executor to account in the court of his appointment and there settle his account and adjudicate the amount due from him to the estate he represents. Thereafter, but not before, his successor can maintain an action at law against him for the balance due.

In *Tyler vs. Wheeler*, 160 Mass., 206,

the court held in substance that an administrator *de bonis non* with the will annexed of an estate cannot maintain an action at law against an administrator of the estate of an

executor of the will *in the absence of an account in the probate court* for assets which the executor appropriated and assumed to administer and which cannot be traced or identified as a part of testator's estate.

In *Amidown vs. Kinsey*, 144 Mass., 587,

a bill in equity by the administrator *de bonis non* with the will annexed, alleging merely that the defendant as executor sold real estate under a power in the will and misappropriated the proceeds and refused to account for them, cannot be maintained as a bill for an account. Also held that the executor's account of these misappropriated assets must be settled in the probate court. Justice William Allen said:

"The statute requires that an executor's account of an estate in process of settlement in the probate court shall be rendered only in that court, and this court has jurisdiction of it only as the supreme court of probate on appeal."

To like effect are

Cobb vs. Kempton, 154 Mass., 266;
 (Citing *Storer vs. Storer*, 6 Mass., 390;
Drew vs. Gordon, 13 Allen, 120-122.)
Thorndyke vs. Hinkley, 155 Mass., 263-265;
Butterick vs. King, 7 Metcalf, 20.

Such prior accounting in the court of appointment follows the rule laid down by this Court in the leading case of

Vaughan vs. Northup, 15 Peters 1.

It may be here said that there are cases in which legatees have sued an executor in a court other than that of his appointment, or even in another state, but those are cases in which a legatee sought his specific legacy, or sought to trace trust funds. Here it is different. All the petitioners were

residuary legatees and devisees. Until an accounting was made to the probate court how could they or any court decide what the residuum was and how much thereof each of the petitioners should receive? No court other than the probate court of Michigan can fix a residuum in an estate there pending.

If there had been any error or irregularity in the direction of the probate court decree that payment be made to the administrator *de bonis non* instead of to some or all of the petitioners, that error or irregularity could have been cured in the probate court on application of any party, or upon appeal to the circuit court. No such error or irregularity was even suggested in the course of the Michigan litigation, and both the Circuit Court of Ottawa County and the Supreme Court of Michigan in mandamus and certiorari proceedings taken by Ferry in respect of the bond on appeal from that decree have incidentally recognized the decree as in accord with the Michigan practice and within the scope and jurisdiction of the probate court.

Stevens vs. Kirby, *supra*, 156 Mich., 526.

Beall vs. New Mexico, 16 Wall, 535, is cited by the Circuit Court of Appeals as authority for its ruling that property of the deceased which does not remain in specie is "administered" and not "unadministered" property; but we have not here to deal with a ruling relating to New Mexico estates when, as in Michigan, the statutes are clear and unmistakable in their comprehensive scope.

G. THE RENDITION OF THAT DECREE WAS NOT AN ATTEMPT TO DEPRIVE RESPONDENT OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The repeated references in the opinion of the court below to the probate decree as "charging" or rendering "liable"

the property of the respondent beyond the jurisdiction of the probate court, and the statement (Trans. p. 43)

"the effect of the adjudication of the probate court of Michigan, if authorized, must be to deprive the defendant of property worth more than \$900,000 situated in the State of Utah, if he has that much there"

occurring in discussion of what constitutes due process of law to support the decree, call for the reminder that the probate court decree could not have and does not purport to have any such extra territorial effect. It stated his account, it fixed a sum as due from him and it directed payment. If the process of the probate court sufficed for that, it was due process of law.

Collection of the debt thus judicially determined is another matter arising in another forum, that of the federal court of Utah, and no process of law to support a judgment "charging" or rendering "liable" respondent's property in Utah could be put to the test except process of that federal court in Utah. As a valid Michigan judgment, the decree had no more effect to charge property of respondent in Utah, than would have his valid note made in Michigan. Each must be sued on in Utah, and only the resulting judgment and execution in Utah would charge his property there.

"Due process of law" to support the probate court decree is not to be measured by the requirements in ordinary actions at law or suits in equity, or in such special proceedings as garnishment or "trustee process," so-called. *Fenton vs. Garlick*, 8 Johns, 195-6, upon which stress is laid in the opinion of the court below (Trans. p. 45) is readily distinguishable from the case at bar. Seth Garlick was not an officer of the Vermont court, but, on garnishment out of that court, answered that he had made a note to Samuel Garlick, the judgment debtor. It does not appear that Seth disregarded that garnishment. If he paid the note at all,

he may have paid it to some innocent purchaser for value before maturity. The facts are not disclosed. After his removal to New York, the Vermont court, on a rule to show cause served upon him in New York, undertook to render judgment against him personally for the amount of the judgment debt of Samuel, with costs. This judgment, when sued on in New York, was held void.

But in the case at bar Ferry was an executor and, as such, an officer of the probate court, subject to its general jurisdiction in all matter relating to the *settlement* of his father's estate.

That the rule as to the notice to executors or administrators is different from that in regard to notice to others, is illustrated by the following quotation from a well considered case:

Moore vs. Fields, 42 Pa. St., 467, 473.

"The regular service of such process is of prime moment, for it is in virtue of that that the tribunal ordinarily gains jurisdiction; *but in the case of these defendants the surrogate had jurisdiction from the time that he granted the letters of administration, and it was their legal duty to appear and settle their accounts without any summons whatever from the surrogate.* The fact that his notice reached them in Pennsylvania was not, in our judgment, a circumstance of any importance."

And that rule has been recognized as the law in this Court.

A case very much in point both on the question of due process of law and the full faith and credit that should be accorded by courts in sister states is

Fitzsimmons vs. Johnson, 90 Tenn., 416.

There the testator died a resident of Ohio, his executors, residents of Tennessee, qualified in the Ohio probate court, and in 1865 made there an alleged final settlement and were

discharged. Twenty-two years later, in 1887, one of the residuary legatees filed her petition in error in the Ohio court of common pleas for review and reversal of the probate court judgment. The surviving executor, absent from Ohio, was cited in by publication and mailing of notice under the Ohio statute. He defaulted, the probate court judgment was reversed and the cause remanded to the probate court. After remand other residuary legatees filed exceptions in the probate court, and copies thereof with notice of hearing thereon was mailed to the surviving executor in Tennessee. He again failed to appear.

The Ohio probate court sustained the exceptions, adjudged that certain sums, *with interest*, aggregating \$130,640, remained, *or should be*, in the hands of the executors for distribution, and ordered the surviving executor to distribute said sum "according to the will * * * and according to law."

Suit was brought on this judgment in Tennessee, and taken for review to the Supreme Court of that State, which held that the Ohio probate court had jurisdiction of the subject matter, since by Ohio statute it had general jurisdiction to settle the accounts of executors and administrators, and to direct distribution of balance found in their hands; and also held that the probate court had jurisdiction of the person of the executor who, being properly before the appellate court by constructive notice, was chargeable with notice of the reversal, remand and subsequent proceedings in probate court, *without additional notice by publication or otherwise*, the court saying:

"In that way he had his day in court when the large judgment was pronounced against him, and he is bound by it the same as if he had been personally served with process."

And the Tennessee court further held (Syllabus):

"The record of the final settlement of an administrator, containing debits and credits in full, and an order to the administrator to distribute a balance found in his hands, according to the will and the law, is a 'judicial proceeding,' within Const. U. S., Art. IV., Sec. 1, which provides that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.' "

While in Ohio an execution might, after thirty days, be issued on the judgment (R. S., Sec. 6195), it does not appear from the record that such execution issued, for, as in the case at bar, issuance would have been futile.

But in the Ohio probate court the stage of final distribution had been reached, whereas in the Michigan probate court that distribution remains to be effected by the administrator *de bonis non*; after it shall have collected what is due and payable by the former executor. The final judgment of the latter court was in settlement of the final account of the removed executor, and not in settlement, as yet, of the estate. It was conclusive of his account and of his relations with the estate, but not of the distribution to be made of that estate among the residuary legatees. Hence, in the case at bar, the action was brought by the successor and not by the residuary legatees.

That an action of debt will lie in the courts of one state upon a decree for the payment of money rendered by a court of chancery of a sister state is fully established.

² Black on Judgments, 2nd Ed., Sec. 869;
Talmage vs. Chapel, 16 Mass., 71;
Moore vs. Petty, 68 C. C. A. 306, 135 Fed., 668;
Butler Shoe Co. vs. U. S. Rubber Co., 84 C. C. A.
167, 156 Fed., 1.

The efficacy of constructive or substituted service is by no means confined to actions or proceedings *in rem* or in the nature of those *in rem*, as the court below would seem to

imply by classing as such the probate court proceeding. Nor is such efficacy affected by the possibility that the action or proceeding *in personam* may result in a judgment for money or in a decree directing payment or delivery thereof.

In the familiar instance of service upon the statutory agent of a foreign corporation, or, failing such agent, upon the insurance commissioner or other official designated by statute of the state in which service is made, such service will suffice for action on a money demand.

Lafayette Ins. Co. vs. French, 18 How., 404;
 Mutual Reserve Co. vs. Phelps, 190 U. S., 147;
 Old Wayne Co. vs. McDonough, 204 U. S., 8.

No such distinction is attempted in the qualifying clause beginning,

"Neither do we mean to assert," etc.,
 on page 735 of

Pennoyer vs. Neff, 95 U. S., 714.

The substituted service in

Vallee vs. Dumergue, 4 Exch., 290,
 approved in the Pennoyer case, and

Copin vs. Adamson, 1 Exch. Div., 17,
 approved in

Wilson vs. Seligman, 144 U. S., 41,

suffice to sustain decrees tending to deprivation of property in as true a sense as does the probate court decree.

See also

Works' Courts and Their Jurisdiction, p. 212;
 Cooley on Constitutional Limitations (6th Ed.),
 p. 434.

We deem it unnecessary to repeat under this sub-head what is said elsewhere in the argument bearing on the sufficiency of the notice given to sustain the decree rendered.

H. THE PROBATE COURT NOT ONLY HAD JURISDICTION OF THE EXECUTOR FROM THE TIME HE ACCEPTED THAT OFFICE, AND EXERCISED IT IN CALLING HIM TO ACCOUNT, BUT HE HIMSELF INVOKED THAT JURISDICTION WHEN, BY HIS NEXT FRIEND AND ATTORNEYS, HE FILED HIS CROSS-PETITION, ASKING ALLOWANCE OF HIS ACCOUNTS AND THAT HE BE DISCHARGED AS EXECUTOR, AS ALSO WHEN HE OFFERED PROOF IN SUPPORT OF HIS CROSS-PETITION, AND WHEN HE SOUGHT TO APPEAL FROM THE DECREE.

The mere fact that Ferry was adjudged a mental incompetent does not bar a proceeding against him for an accounting of and for the acts done prior to such adjudication. That accounting is by the incompetent, not by his guardian.

Ingersoll vs. Harrison, 48 Mich., 234.

In contemplation of law there is a complete parallel between a lunatic and an infant defendant. Both are *non sui juris*, both are liable to be made defendants and have their rights adjudicated, and in both cases the courts in which the proceedings are had are bound to see that their defense is conducted by a competent person, recognized as such by the court.

Woerner on Guardianship, Secs. 131 and 137;
Sturges vs. Longworth, 1 Ohio St., 544, 553.

The completeness of the parallelism should be qualified by the observation that while the infant has never been *sui juris*, the incompetent may have been, and while *sui juris* may have accepted obligations or trusts, or otherwise placed himself in relations, from which he is not released by his subsequent incompetency.

In Kingsbury vs. Buckner, 134 U. S., 650,

the plaintiff, an infant non-resident, had appeared by next friend, and it was sought to impeach the decree by showing that there was no proof that the next friend had authority to bring the action, and that there was negligence or fraud in its prosecution, but this Court held that such special authority need not be exhibited, and that since the next friend moved in the matter with the approval of those nearest to the infant, there was no ground to say that he acted without authority.

Coming into court in that way, he invoked its jurisdiction just as effectively as if he had instituted a proceeding by service of process.

Ferguson vs. Oliver, 99 Mich., 161.

While the next friend, duly appointed, cannot by any wrongful act on his part affect the rights of his ward, nevertheless he can, when acting in good faith and on the advice of counsel, come into court and give that court jurisdiction. As has so often been said by the courts and text writers, the care which the court exercises over persons *non sui juris* must be "used as a shield and not as a dagger."

In the Matter of Moore, 209, U. S., 490,

the infant plaintiff, by his next friend, brought suit in a state court against a railway company and the defendant petitioned for removal to the federal court. Under *ex parte* Wisner, 203 U. S., 449, the federal court could not take jurisdiction unless both parties thereto consented, and it was held that the infant, by appearing in the federal court by his next friend and counsel upon such removal, consented to the jurisdiction just as effectively as he could have done if *sui juris*. The next friend was there acting in good faith and

represented by counsel; and so also in the case at bar the next friend was acting in good faith and was advised and represented by counsel.

See also

Sullivan vs. Andoe, 4 Hughes 290, 6 Fed., 641.

The circumstances under which a next friend for Edward P. Ferry was appointed and appeared are set out in folios 5-8 of the record (Trans. pp. 3-5). The cross-petition prayed as affirmative relief that the probate court by order determine that the estate had been fully administered and closed, that the executor be discharged, that his bond as such be canceled and the sureties thereon released, and that he have such other and further relief as to the court might seem meet. (Trans. pp. 4, 15.)

If this cross-petition stood alone, it would raise every question presented in the probate court. Ferry had the right to bring a suit in Michigan, if he desired, and to bring it by general guardian or next friend, when himself incompetent. He brought this cross-proceeding for affirmative relief in the court of his appointment by his next friend named for that very purpose, claiming that he was entitled to credit in his accounts for the sums or properties which he claimed to have turned over to himself as trustee, and that he as executor be acquitted of all liability. It was for that court to determine the issue thus raised, and it did determine it adversely to him by the decree of December 31, 1907. (Trans. p. 15.)

He had made the same contention when ordered to file a more detailed statement of account (Trans. p. 10).

Proofs were taken in behalf of the respective parties, and the accountant was cross-examined by Ferry's counsel with regard to the very account which the court settled. (Trans. pp. 10, 11.)

From that decree he sought to appeal to the circuit court, thereby recognizing the decree as final. (Trans. pp. 19, 20.)

If the decree is not final in Michigan an appeal does not lie.

Erwin vs. Ottawa Circuit Judge, 138 Mich., 271.

The appeal must be regarded not as a new suit, but as a continuance of the old one.

Freeman on Judgments, Sec. 569;
Nations vs. Johnson, 24 How., 195.

By attempting to perfect that appeal and instituting various proceedings to that end, he recognized the jurisdiction of the probate court, conceded that he was a party to and bound by its decree, and brought himself squarely within the often repeated ruling of this Court that when one assails a judgment he admits the existence and finality of it.

Lawrence vs. Nelson, 143 U. S., 215;
U. S. vs. St. Louis, etc., Co., 184 U. S., 247;
Hovey vs. McDonald, 109 U. S., 150.

And as was well said in

Stevens vs. Kirby, 156 Mich., 526,

"* * * we must consider that the executor [the respondent here] has all through been represented by well known and competent attorneys in this state of good reputation, and that they in good faith advised the course pursued."

The authority of counsel so appearing and representing is presumed,

Osborn vs. Bank, 9 Wheat, 738,

and their appearance is as effective as actual personal service upon him within the state.

Hill vs. Mendenhall, 21 Wall., 453;
Laing vs. Rigney, 160 U. S., 531.

They appeared for him after the decree as well as before the decree. They appeared in the mandamus proceedings which delayed rendition of the decree and by which it was sought to eliminate from that decree the fixing of his indebtedness to the estate. He was thus and otherwise fully apprised at all times of everything that led up to and went into that decree, and was in probate court to respond to it.

CONCLUSION.

For the reasons and upon the authorities collated under this division I and its appropriate sub-heads A to G, inclusive, it is respectfully submitted that the decision of the learned court below was wrong. It was plainly wrong under its own succinct test:

"The cause of action set forth in the complaint rests upon the decree of the Probate Court of Ottawa County that Ferry the individual is liable for a fixed amount of damages for his taking from himself as executor and his conversion to his own use of property of the estate which came to his hands as executor. If that court had jurisdiction to render that adjudication the complaint stated a good cause of action, if it did not have that jurisdiction the demurrer was rightfully sustained."

(Trans. p. 36.)

That the probate court had jurisdiction to charge against him in his account all damages sustained for waste as the statute (Sec. 9435) defines waste, and to fix his liability, has been demonstrated.

Whether or not the probate court also had jurisdiction to direct payment, or that the payment, when made, be made to his successor, is not involved in the test which the court below here applies to that decree. But such jurisdiction it clearly had under Michigan jurisprudence, and payment to

his successor as decree will satisfy all claims which any persons interested in the estate might otherwise have had against him.

As adjudicating an individual liability it was properly made the basis of an action against him in Utah.

We submit that in any event, the opinion below should be reviewed and brought into harmony with the statutes and decisions of Michigan, as they are herein set forth, and particularly with regard to the scope and effect of the accounting proceeding. Certainly the executor had "large sums of money and a large amount of property belonging to said estate," on hand at the time of his second annual account which had disappeared at the time of his final account. (Trans. p. 12.) Should these assets also under the opinion be excluded from the account? We spent four years and a half in that accounting, facing many difficulties as the decree itself shows, and we are loath to believe that while valid in Michigan it is valid nowhere else. That the probate court had jurisdiction over Edward P. Ferry and of the subject matter to some extent is recognized by the Court of Appeals. Where can the line of demarcation be drawn in the probate decree? What parts of it are binding upon other courts and what parts are not? These are questions which are proper subjects for determination by this Court.

The court below in its opinion says of the probate court (Trans. p. 39):

"* * * that court acquired plenary jurisdiction to adjudicate whether or not he should be removed as executor, whether or not he should account for the un-administered assets of his father's estate, the true state of that account, and whether or not the Trust Company should be appointed administrator *de bonis non*, and its determination of these issues was conclusive."

and thereafter (Trans. pp. 39-40) it is said:

"The only finding and decree which the Michigan probate court was empowered to make and that which it should have made in the case before it was an adjudication of the amount of the assets of the estate of the deceased that were in the hands of the executor, *Ferry, or unaccounted for by him*, and an order that he pay or deliver them over to his successor in interest."

(The italics are ours.)

It is respectfully submitted that the patent ambiguity presented by these two statements should be rectified. We are here confronted with a decision of the Circuit Court of Appeals holding that the executor can be compelled to account only for "unadministered assets," as that court construes the term, and yet the decision holds that the Michigan probate court could adjudicate the amount of assets of the estate of the deceased that were in the hands of the executor, *Ferry, or unaccounted for by him*, and order that he pay or deliver them to his successor. In legal effect the latter procedure was followed, and yet we are told that it exceeded the probate court jurisdiction.

It needs no demonstration that if this opinion is to stand uncorrected the resulting conflict between federal and state jurisprudence will prove of great public import, in that it will impede the course of justice and make any State of the Union which follows this opinion an asylum of refuge for the dishonest executors of other States, despite the law in force in the State of appointment.

We respectfully urge that the reasons for review by writ of certiorari as set out in divisions I to VI, inclusive, on page 12 of the petition for that writ are amply sustained by the record and the argument.

WILLARD F. KEENEY,
EDWARD B. CRITCHLOW,
HENRY C. HALL,

CHARLES S. THOMAS, *Attorneys for Petitioner.*
WALTER I. LILLIE,
WALTER E. ERNST,
Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1912.

No. 200.

THE MICHIGAN TRUST COMPANY, A CORPORATION
Petitioner,

vs.

EDWARD P. FERRY,
Respondent.

BRIEF AND ARGUMENT IN BEHALF OF
PETITIONER.

STATEMENT.

This cause comes here upon writ of certiorari heretofore granted by this Honorable Court directing the Circuit Court of Appeals for the Eighth Circuit to certify to this Honorable Court for its review and determination the cause of your petitioner, the Michigan Trust Company, a corporation, plaintiff, versus Edward P. Ferry, defendant, the respondent herein.

Said action was brought in the circuit court for the District of Utah by the petitioner, a corporation of Michigan, against the respondent, a citizen and resident of Utah, to recover \$915,355.08, with interest and costs, based upon a final decree of the probate court of Ottawa County, Michigan, whereby, among other things, the respondent was directed to pay said sum to said The Michigan Trust Company as administrator *de bonis non* with the will annexed of William M. Ferry, deceased. The jurisdiction of said circuit court was based on diversity of citizenship.

Demurrer to the complaint was sustained on the grounds, as expressed by Marshall, J., in his opinion, that the decree of the probate court was not final and was not in favor of the plaintiff, petitioner here. Thereafter an amended complaint was filed setting forth more in detail the proceedings had prior to entry of the probate court decree. These facts were in part set forth by making the decree and its findings a part of the complaint in accordance with the practice in the State of Utah.

Orpheus Vaudeville Co. v. Clayton Inv. Co. (Utah),
October Term, 1912, 128 Pac., 575.

Demurrer to this amended complaint was sustained without opinion and judgment rendered for defendant, respondent here.

On writ of error said judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit. (Trans., p. 28.)

A petition for rehearing was denied by that court and thereafter the petition made to this Honorable Court for writ of certiorari was granted.

The records of the Circuit Court and Circuit Court of Appeals, with copies, were submitted in conjunction with said petition.

Briefly stated, the proceedings had in Michigan leading up to the probate court decree were these:

1. In the year 1867, Rev. William M. Ferry, a former missionary to the Indians at Mackinac and subsequently founder of Grand Haven, in Ottawa County, Michigan, died a citizen and resident of that County, leaving a last will and testament which was admitted to probate in 1868 in the Probate Court of that County. It disposed of what was perhaps at that time the largest fortune in western Michigan by dividing the residuum, after certain specific and charitable bequests, among his six children, one-fourth to each of his three sons, and one-twelfth to each of his three daughters. His sons were Lieut. Col. William M. Ferry, Senator Thomas W. Ferry, and the respondent, Edward P. Ferry, who was named as executor.

The will in terms gave the executor ten years, or more if he deemed necessary, in which to settle the estate. The executor duly qualified in said probate court, and not elsewhere, and in due course filed in that court his first and second annual accounts. He filed no other. The second annual account showed a large balance of assets on hand.

Thereafter, and before the expiration of said ten years, Edward P. Ferry removed from Michigan to Utah. He there subsequently became a mental incompetent, and was so adjudged in February, 1901, and thereupon his sons, W. Mont. Ferry and Edward S. Ferry, were appointed and qualified as guardians of his person and estate.

2. On June 26, 1903, all of the residuary legatees and devisees then living (except Edward P. Ferry), and the representatives and successors in interest of all of them who were then deceased, filed in said probate court their petition praying that Edward P. Ferry be removed as executor by an order of that court and that "he or his representatives be ordered to account forthwith to this court for the estate of said deceased down to the date of said accounting," and that administration be granted to The Michigan Trust Company, petitioner herein, or to some other suitable person, as admin-

istrator *de bonis non* with the will annexed (Trans., pages 2, 47; and thereafter the court, by its order, fixed the 21st day of July, 1903, for the hearing of said petition. It further ordered that notice thereof be given by publication in a newspaper designated in accordance with the statutes of Michigan in such case made and provided. (Trans., pp. 3, 48.) The said order was duly published as therein directed and according to the statute in such case made and provided, and personal service of said order and notice was made upon Edward P. Ferry and also upon his said guardians, W. Mont. Ferry and Edward S. Ferry, at Salt Lake City, Utah. (Trans., page 3.)

3. Upon the day so fixed for hearing Edward P. Ferry appeared by his counsel, and by his guardian *ad litem* and next friend appointed by said court on due application therefor on his behalf, said counsel, guardian *ad litem* and next friend being all employed for that purpose by the guardians of said Edward P. Ferry under order and permission of the District Court for the Third Judicial District of Utah, which court had theretofore appointed said guardians (Trans., pages 3 and 4), and filed his answer to the said petition, as also his cross-petition praying for affirmative relief. Answer to this cross-petition was filed by the original petitioners, and the issues so joined were set for hearing (Trans., page 4).

4. During the progress of that hearing, Edward P. Ferry appeared therein and was represented by his several attorneys, as well as by his guardian *ad litem* and next friend (Trans., pages 4-5). Proofs were taken in behalf of the petitioners and also in behalf of Edward P. Ferry. An interlocutory order was made by the probate court requiring the executor to file a more detailed statement of account of his receipts and disbursements on account of said estate since his second annual account, including the disposition, if any, made of properties on hand at the date of said second annual account and of any other properties belonging

to said estate not already accounted for by the executor in that court (Trans., page 9). The executor contended before the probate court that no further account should be required, and he neglected and refused to render any such account (Trans., page 9).

5. Thereafter, by leave of court, further proofs were taken, and after the same were concluded, and as preliminary to final order on the merits, the probate court ordered notice to be given that upon a day therein fixed, the account, as the petitioners claimed the same to be, would be submitted to the court, and that application would then and there be made for the examination and approval thereof, and further for leave to charge, surcharge and falsify the alleged final account of said executor then before the court, to file amendments and objections thereto, and that the said petitioners would then and there move the court for a final decree on the merits in the matter of said account (Trans., pages 9-10). This order was duly published, as therein directed, giving all persons interested notice of the same, and personal notice by service thereof in Utah was also given to all persons interested of the examination of the said final account in accordance with the order of the probate court and the statute of Michigan in such case made and provided (Trans., page 10).

6. Pursuant to said order and notice, the petitioners, by leave of court, made and submitted to the court a statement charging, surcharging and falsifying the alleged final account of the executor already before the court, which statement presented the proposed amendments and objections thereto, and stated said account, based upon proofs taken, as the petitioners claimed the same to be. The accountant for petitioners was thereupon cross-examined on behalf of the executor, and the court, after carefully examining and correcting the alleged final account of the executor and all other statements

and accounts submitted (Trans., page 10), rendered its decree on December 31, 1907.

7. By this final decree the probate court found that the executor had not accounted for all the moneys and properties of the estate coming into his hands, and was not entitled to discharge; that at the time of rendition of his second annual account he had on hand large amounts of money and property belonging to the estate; that since that date and down to the year 1900 other large amounts of money and property belonging to the estate had come into his hands, none of which had been accounted for by him; and that large amounts of money and property belonging to the estate had been received, misappropriated and converted by him to his own use instead of being applied to or for the benefit of the estate (Trans., page 11).

The probate court further found that the estate had not been fully administered; that the executor was not entitled to an order closing the estate; that it was his duty to render a true and perfect account of his doings as such executor, but this he had neglected and refused to do; that those acting for him had taken from Michigan to Utah books and papers containing certain of his accounts as executor, had refused to return the same when ordered by the court to do so, and had, in so far as lay in their power, suppressed evidence and endeavored to prevent the rendition of a decision on the merits, but that the proofs taken afforded such data as to enable the court to state the executor's account truly, correctly and without injustice to the executor (Trans., page 12). The probate court further found from the proofs that, after crediting all disbursements, Edward P. Ferry, the executor, was indebted to the estate on that date upon balance of accounts in the sum of \$1,220,473.44 (Trans., page 13).

8. Upon these and other findings (Trans., pages 10-14) the decree denied the cross-petition of Edward P. Ferry

(Trans., page 13), removed him as executor and appointed the petitioner herein as administrator *de bonis non* with the will annexed (Trans., page 14), permitted him as residuary legatee to retain one-fourth of the net balance aforesaid as fixed by the decree (Trans., page 14), and adjudged that the remainder, to-wit, \$915,355.08, for which he was individually liable, be paid by him to this petitioner, as administrator aforesaid (Trans., page 16).

9. A copy of this decree was attached to and made a part of the said amended complaint (Trans., pages 7 to 15) in accordance with the practice in the Court of Utah.

Orpheus Vaudeville Co. v. Clayton Inv. Co. (supra).

The amended complaint, in giving the substance of the petition dated June 26, 1903, in the probate court summarized the prayer for accounting as being that Edward P. Ferry be ordered to account forthwith to said court "for the residue of said estate of said deceased which was unadministered" (Trans., page 3). The word "administered" was there used in the sense given it by the jurisprudence of Michigan.

SPECIFICATION OF ERRORS.

The grounds upon which this court is asked to review the judgment of the Circuit Court of Appeals are, as stated in the petition for writ of certiorari:

1. Because the Circuit Court of Appeals of the Eighth Circuit has failed to give full faith and credit to the final judgment of a state court of general jurisdiction in matters relating to settlement of estates, to-wit, the decree of the Probate Court of Ottawa County, Michigan. The denial of such faith and credit is due to errors of said court apparent from its opinion in this cause and committed, *inter alia*, in the following particulars:

A. Said Court erred in holding that the accounting in the probate court of Michigan could be had only of the assets then remaining unadministered in the hands of the executor as such, thereby failing to recognize the force and binding effect of Section 9428 (Compiled Laws of Michigan, 1897), which is as follows:

"Every executor and administrator shall be chargeable in his account with the whole of the goods, chattels, rights and credits of the deceased, which may come to his possession; also, with all the proceeds of the real estate which may be sold for the payment of debts and legacies, and with all the interest, profit and income which shall in any way come to his hands from the estate of the deceased."

B. Said Court erred in holding that, under the laws of Michigan, assets of an estate which have been converted by an executor and appropriated to his own use are "administered" assets, and that the probate court of Michigan had no jurisdiction to require the defaulting executor to account for such converted and misappropriated assets—this holding being in direct conflict with the rule laid down in Michigan.

Lafferty v. The People's Bank, 76 Mich., 35;
Hall v. Grovier, 25 Mich., 427.

C. Said Court erred in not recognizing or giving force or effect to the notice served personally and by publication upon the executor, who was then before the probate court accounting to it, fixing date for examination of the final account of the executor and the statement of the petitioners charging, surcharging and falsifying his alleged final account.

D. Said Court erred in limiting by construction and interpretation the power and jurisdiction of the probate court to compel the executor to "account," that is, to state honestly

the items with which he should be charged and credited, and to pay over and deliver the balance in full.

Hall v. Grovier, 25 Mich., 427, 436;
Pyatt v. Pyatt, 46 N. J. Eq., 285.

E. Said Court erred in holding that no claim or charge against the executor for loss to the estate by reason of his waste or maladministration could be considered by the probate court in removing the executor and settling his account, and that the decree was improperly rendered against Edward P. Ferry, individually.

Comp. Laws Mich., 1897, Sec. 9435.

"When an executor or an administrator shall neglect or unreasonably delay to raise money, by collecting the debts or selling the real or personal estate of the deceased, or shall neglect to pay over the money he shall have in his hands, and the value of the estate shall thereby be lessened, or unnecessary cost or interest shall accrue, or the persons interested shall suffer loss, the same shall be deemed waste, and the damages sustained may be charged against the executor or administrator in his account, or he shall be liable therefor on his administration bond."

Basom v. Taylor, 39 Mich., 682;
Stevens v. Kirby, 156 Mich., 526;
Clark v. Fredenberg, 43 Mich., 263;
Pierce v. Holzer, 65 Mich., 263;
In re Palm's Appeal, 44 Mich., 637.

And, in consequence, said Court erred in holding that any charge or claim against the executor for loss to the estate by reason of his waste or maladministration constituted a challenged cause of action *in personam* at common law, to-wit, for *devastavit*, to be pleaded and noticed as such, of which the probate court had no jurisdiction.

F. Said Court erred in holding that the probate court had no jurisdiction to direct that the balance due from the executor to the estate be paid to the administrator *de bonis non* appointed in his place and stead, and in this connection the said Court erred in not taking cognizance of the presence in Court and consent of all parties who might lay claim to that balance.

Storer *v.* Storer, 6 Mass., 390;
 Campau *v.* Gillette, 1 Mich., 416;
 Butterick *v.* King, 7 Metc., 20;
 Wiggin *v.* Swett, 6 Metc., 194, 198;
 Sewall *v.* Patch, 132 Mass., 326;
 Minot *v.* Norcross, 143 Mass., 326;
 Cranson *v.* Wilsey, 71 Mich., 356;
 Morris *v.* Morris, 4 Grattan (Va.), 293.

And said Court erred in holding that the only way in which the probate court may ever acquire any jurisdiction whatever over claims against the executor because of his neglect or maladministration is by action on his bond by the judge of probate.

G. Said Court erred in holding that the decree of the probate court attempted to deprive Edward P. Ferry of property without due process of law.

Fitzsimmons *v.* Johnson, 90 Tenn., 416.

H. Said Court erred in failing and refusing to give force and effect to the affirmative act of the executor, Edward P. Ferry, who by his next friend invoked the jurisdiction of the probate court by a cross-petition filed in the proceeding wherein his acts as executor were brought in question, and in said cross-petition asked that his accounts be allowed and that he be discharged as executor, and offered proofs in support of said cross-petition. This cross-petition was denied by the decree.

In the Matter of Moore, 209 U. S., 490.

II. Because the Circuit Court of Appeals failed to construe a judgment of Michigan in accordance with the statutes and decisions of that State, and the construction given is opposed to and conflicts with the decisions of the highest court of Michigan.

ARGUMENT.

The writ having been granted, the questions now coming to the consideration of the court are those pertinent to the reversal or affirmance of the judgment brought here for review.

For convenience in discussion those relating to errors in that judgment can be grouped under one general heading and its appropriate sub-heads, as follows:

I.

FULL FAITH AND CREDIT SHOULD BE ACCORDED BY THE COURTS OF THE UNITED STATES TO THE FINAL DECREE RENDERED IN MICHIGAN, WHICH SHOULD BE CONSTRUED IN THE LIGHT OF THE STATUTES AND DECISIONS OF MICHIGAN, AND SHOULD BE GIVEN THE SAME EFFECT IN OTHER STATES AS IT HAS BY LAW AND USAGE IN MICHIGAN.

To this general proposition there will be no dissent as applied to final judgments of state courts of general jurisdiction.

Cases supporting the full faith and credit doctrine are legion. Citation of them would be a mere parade of authorities more familiar to this Court than to us. Through them all run the controlling principles first enunciated by this Court, in 1813, in the leading case of

Mills v. Duryee, 7 Cranch, 481,

in which Mr. Justice Story said :

"It remains only then to inquire in every case, what is the effect of a judgment in the state where it is rendered? . . . it is beyond all doubt that the judgment of the supreme court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also. . . . When congress gave the effect of a record to the judgment, it gave all the collateral consequences. . . . And we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision."

In 1909, this Court, in

Smithsonian Institute v. St. John, 214 U. S., 19,

quoted with approval the following from

Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S., 615,

in which Mr. Justice Waite said :

"Without doubt the constitutional requirement, Art. 4, Sec. 1, that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state' implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813 in *Mills v. Duryee*, 7 Cranch, 481, 3 L. Ed., 411, and steadily adhered to ever since."

To these citations of the first and one of the latest decisions on the subject may be added, as in point,

Forsyth v. Hammond, 166 U. S., 506,

where this Court says :

"The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the federal courts. We may think that the Supreme Court of a state has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

So also:

Converse v. Hamilton, 224 U. S., 243;
Claiborne v. Brooks, 111 U. S., 400, 410;
Burgess v. Seligman, 107 U. S., 20, 33;
Bucher v. Cheshire R. R. Co., 125 U. S., 555;
Lamb v. Powder River Co., 132 Fed., 434.
Fitzsimmons v. Johnson, 90 Tenn., 416.

The probate decree in question falls under the general rule. It meets every requirement of that rule, as will be noted in the following particulars:

(1) *Probate court jurisdiction of person and subject matter.*

The Circuit Court of Appeals decides that the probate court had jurisdiction, for some purposes, of the executor appointed by it and of the subject matter, and exercised its jurisdiction of the person in the statutory way, which was sufficient for those purposes. (Trans., page 34.) This ruling was based upon the authorities there cited by it and is sustained by the following:

Comp. Laws Mich. (1897), Sec. 688; (text *infra*, p. 21);
Munger v. Judge of Probate, 86 Mich., 363, 369;
Spencer v. Houghton, 68 Calif., 82;
Trumpler v. Cotton, 109 Calif., 250;
Vallee v. Dumergue, 4 Exch., 290;
 (approved in) *Pennoyer v. Neff*, 95 U. S., 714, 735;
Becquet v. McCarthy, 2 Barn & Ad., 951;
Copin v. Adamson, L. R., 9 Exch., 345; 1 Exch.
 Div. 17;

(approved in) *Wilson v. Seligman*, 144 U. S., 46; *Usry v. Usry*, 82 Ga., 198; *Heisen v. Smith*, 138 Calif., 216; *Lafayette Ins. Co. v. French*, 18 How., 404; *Mutual Reserve v. Phelps*, 190 U. S., 147; *Old Wayne Co. v. McDonough*, 204 U. S., 8; *Moore v. Fields*, 42 Pa. St., 467, 473; *Martin v. Martin*, 214 Pa. St., 389, 394. *Stevens v. Kirby*, 156 Mich., 526.

We contend and shall endeavor to demonstrate in discussion under the appropriate subheads that such jurisdiction and exercise extended to all purposes of the probate court decree.

(2) *Finality of its decree.*

The decree is final under the laws and decisions of Michigan. There was no appeal or writ of error. It removed Edward P. Ferry as executor, thereby divesting him of an office and a title. It appointed a successor who, upon acceptance, became vested with both. It severed and terminated forever his official relation with the estate, and the Circuit Court of Appeals has rightly declared that the determination by the probate court was final and conclusive of these issues, as well as of his duty to account for "unadministered" assets and the true state of that account. In other words, the decree was final in so far as the Circuit Court of Appeals recognized the jurisdiction of the probate court. (Trans., page 34.)

After rendition of the decree, the defendant sought to appeal, and, in mandamus proceedings brought by him to compel the probate judge to accept a nominal appeal bond, the Circuit Court of Ottawa County, Michigan, declared the decree to be final, and on certiorari was sustained therein by the Michigan Supreme Court.

Stevens v. Kirby, 156 Mich., 526.

If the decree is not final in Michigan, an appeal does not lie.

Erwin v. Ottawa Circuit Judge, 138 Mich., 271.

We call attention to the provisions of the decree sued upon (Trans., pp. 8-15).

It undertakes, after full hearing upon the proofs, to make disposition of the accounting suit upon its merits; it determines the amount due from Edward P. Ferry, as executor of his father's will; it determines the amount for which he is personally liable; it directs payment of all except his quarter of this amount, viz: \$915,355.08, to his successor. If no appeal is taken by Edward P. Ferry from this decree, the adjudication there made would be binding upon him in all subsequent proceedings in the cause.

Benedict v. Thompson, 2 Doug., 299;
Shepherd v. Rice, 38 Mich., 556;
Austin v. Austin, 132 Mich., 453;
Barbour v. Patterson, 145 Mich., 459, 461.

For instance, in

Shepherd v. Rice (*Supra*),

a decree found the rights of the various parties to a tract of land, ordered a partition, and ordered a reference to a commission to inquire and report whether the land could be partitioned.

The commission later reported that the land could be divided. This report was by a final decree ratified and confirmed, and from it an appeal was taken.

The Michigan court held that the first decree was final, saying:

"The entire merits of this controversy were determined by this first decree and it is now too late to examine into the merits of the case."

Nay, more: The decretal order of December 31, 1907, here sued upon, answers every definition of a final order or decree as given by the Supreme Court of Michigan in its decisions, and it is therefore appealable, and, if not appealed from, is binding upon Edward P. Ferry and all parties in interest, in all courts and jurisdictions, in so far as respects matters therein determined.

Lewis v. Campau, 14 Mich., 458, 460;
Barry v. Briggs, 22 *id.*, 204;
Damouth v. Klock, 28 *id.*, 163;
Brown v. Bronson, 35 *id.*, 415, 419;
Shepherd v. Rice, 38 *id.*, 556;
Taylor v. Sweet, 40 *id.*, 736;
Morey v. Grant, 48 *id.*, 326;
Goss v. Stone, 63 *id.*, 319;
Hodges v. McDuff, 69 *id.*, 76;
Perrin v. Lepper, 72 *id.*, 454;
Hake v. Coach, 105 *id.*, 425, 431-433;
Mardian v. Wayne Circuit Judge, 118 *id.*, 353;
Devine v. Wayne Circuit Judge, 118 *id.*, 354;
Cole v. Cole's Estate, 125 *id.*, 655;
Austin v. Austin, 132 *id.*, 453.

Many of these cases are chancery cases which were appealable under Sec. 549, Compiled Laws of Michigan, 1897, which reads as follows:

“Any complainant or defendant who may think himself aggrieved by the order overruling a general demurrer, or by the decree or final order of a Circuit Court in Chancery, in any cause, may appeal therefrom to the Supreme Court.”

It will be observed that this statute provides for an appeal in an equity cause only where the order is final, and that therefore in the Chancery cases above cited, when an appeal is allowed, it is because the Supreme Court considers the order final.

In

Lewis v. Campau, 14 Mich., 458,

it is held that where a bill is filed in aid of proceedings to remove administrators, and to have a receiver take charge of the assets, until the legal action is disposed of, an order appointing such receiver for the purpose set out in the bill, is in effect a final decree, although purporting to be interlocutory, and is therefore appealable.

In

Barry v. Briggs, 22 Mich., 201,

it is held that an order appointing a receiver to take charge and dispose of all of the property held by defendant as surviving partner of a firm is an order divesting the entire legal estate of defendant in property over which he had exclusive control as well as legal title, and it is therefore a final decree from which an appeal lies.

In

Morey v. Grant, 48 Mich., 326,

it is held that an order made when a cause in chancery is ripe for final hearing upon pleadings and proof, which appoints a receiver for partnership property, is final and appealable, notwithstanding it does not in terms purport to be final.

In

Damouth v. Klock, 28 Mich., 163,

it was held that a decree in a partition suit which fixes the respective rights of the parties, although it contains an order of reference to take an accounting and to ascertain whether actual partition is practicable, or whether a sale of the property and distribution of the proceeds is necessary, in such a final order or decree as to be appealable.

In

Hake v. Coach, 105 Mich., 425,

where the decree found that certain transactions were partnership matters and not individual enterprises, fixed the period over which the accounting should extend, and directed the referee to state an account on the basis of the decree, such decree was final as to the matters in dispute and was therefore appealable.

In

Austin v. Austin, 132 Mich., 453,

it is held that a decree directing a partition is final, although the matter is referred to a commissioner to determine the value of the property.

One of the objections raised by the defendant in the courts below to the maintenance of this action is that the judgment or decree of the probate court is not a judgment in such sense that it can be made the basis of an action of debt, that there is no finality about it, and that, generally, it may be collaterally impeached. Assuming that the probate court of Ottawa County had jurisdiction of the person of E. P. Ferry in the accounting, the case of

Johnson v. Powers, 139 U. S., 156,

is opposed to this contention.

In that case proceedings were taken under the Statutes of Michigan in the probate court for establishment of claims against the estate of one Stewart. The procedure in that state is that all claims against the estate shall be proved before commissioners appointed to hear them, or before the probate court when no commissioners have been appointed. These commissioners become a special tribunal; they act judicially and the administrator cannot bind the estate by admitting the correctness of claims, but must leave them to be proved in the usual mode. Johnson, who was also the administrator of the estate, presented his claim as a creditor and it was allowed. Afterward he sued in New York to set aside

certain fraudulent transfers of his intestate, and sought to use the adjudication of these commissioners as a judgment forming the basis of a creditor's bill. The Supreme Court by Justice Gray examined the effect of the adjudication of the commissioners and uses this language:

"The commissioners, when once appointed, become a special tribunal, which, for most purposes, is independent of the probate court, and from which either party may appeal to the circuit court of the county; and, as against an adverse claimant, the administrator, general or special, represents the estate, both before the commissioners and upon the appeal. 2 How. St., Sec. 5907-5917; *Lothrop v. Conely*, 39 Mich., 757. The decision of the commissioners, or of the circuit court on appeal, should properly be only an allowance or disallowance of the claim, and not in the form of a judgment at common law. *La Roe v. Freeland*, 8 Mich., 531. But, as between the parties to the controversy, and as to the payment of the claim out of the estate in the control of the probate court, it has the effect of a judgment, and cannot be collaterally impeached by either of those parties. *Shurbun v. Hooper*, 40 Mich., 503."

The conclusion is reached that, as against the defendants in the State of New York, who did not appear before the commissioners the judgment allowing Johnson's claim was *res inter alias acta*, and hence could not be used as the basis of the creditor's suit.

It is plain, however, that had the New York defendants participated in the proceedings in Michigan they would have been held to be bound conclusively, and the order or judgment of the commissioners would not have been collaterally impeached by them.

Mr. Justice Brown, who dissents, states, in respect to the commissioners, whom he speaks of as "an independent special tribunal," that "their decisions, unless appealed from, are final, and are to all intents and purposes judgments, except

that no execution can issue upon them." The only difference between the majority of the court and the dissenting justice is as to whether such a judgment should bind only the parties before the tribunal, to-wit, the claimant and the administrator as representing the estate, or should be binding upon all persons. It is difficult to perceive why the judgment or decree now in question litigated actively by Edward P. Ferry should be inferior in any respect to the judgment of a board of commissioners.

Another reason advanced to support this contention as to lack of finality was that the probate court left for future adjudication the question of what interest E. P. Ferry had in the estate of his brother, Thomas W. Ferry. But that is a question properly left to be determined in the estate of Thomas W. Ferry.

Defendant, in the argument below, also quoted from the opinion of Judge Marshall sustaining demurrer to our original complaint, in which the learned trial judge refers to *Forgay v. Conrad*, 6 How., 241, and *Louisiana Bank v. Whitney*, 121 U. S., 284.

These two cases, in our judgment, do not sustain the broad proposition for which they are cited. We respectfully, but strongly, urge:

1. That all rights at issue of the parties concerned were adjudicated by the decree now in suit.
2. That the test of finality of the Michigan judgment is to be found in the law of Michigan, even if that law conflict with the law of Utah or the law as voiced by the Supreme Court of the United States.
3. That the language quoted from *Forgay v. Conrad* is essentially *dictum* not decision.
4. That *Louisiana Bank v. Whitney*, and the *dictum* in *Forgay v. Conrad* apparently relate only to orders of pay-

ment professedly not final, but *pendente lite*, directing custody of the fund in suit until its ownership should be determined.

5. That if otherwise, these cases are overborne by later and express decisions of the same Court, so that the doctrine as to "property held in trust to be delivered to a new Trustee appointed by the Court," is not the present doctrine of the Supreme Court.

Although it is submitted that the only proper criterion of the decree now sued upon is the Michigan law and decisions, yet it is believed that this decree stands the test even of the Federal decisions.

The following cases clearly draw a distinction between interlocutory and final decrees not noticed in *Forgay v. Conrad*:

- Bank *v. Sheffy*, 140 U. S., 52;
- Wheeling & Belmont Co. v. Wheeling Co.*, 138 U. S., 287;
- Hill v. Chicago Co.*, 140 U. S., 52;
- The Wabash & Erie Canal Co. v. Beers*, 1 Black, 54;
- Bronson v. LaCrosse Co.*, 2 Black, 524;
- Stovall v. Banks*, 10 Wall, 583;
- Winthrop Iron Co. v. Meeker*, 109 U. S., 180;
- Edgell v. Felder*, 99 Fed., 324;
- City of Eau Claire v. Payson*, 107 Fed., 552;
- R. R. Company v. Bradleys*, 7 Wall, 575;
- Hinckley v. Gilman, Etc., Co.*, 94 U. S., 467;
- Desvergers v. Parsons*, 60 Fed., 143;
- East Coast Company v. Peoples' Bank*, 111 Fed., 446.

The decisions in all the above cases violate the sweeping generalization of the *dictum* in *Forgay v. Conrad*. Indeed, in *Bronson v. LaCrosse Co.*, 2 Black, 524, where it was held that a decree in foreclosure directing a sale is final, though there still remains something for the Court to do, the opinion quotes with approval the following excerpt from *Forgay v. Conrad*:

"This Court has not therefore understood the words 'final decree' in this strict and technical sense, but has given them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature."

If the trial Court has treated a decree as final and there is doubt about it, the appellate Court will resolve the doubt in favor of the conception of the trial Court.

Deslions v. La Compagnie, Etc., 210 U. S., 95; *McGourkey v. Toledo, Etc., R. Co.*, 146 U. S., 536.

East Coast Cedar Co. v. Peoples Bank, (C. C. A.) 111 Fed., 446, is an instructive case from the Fourth Circuit.

The Court there holds that a decree which finds that lands should be partitioned, orders a sale and that the proceeds be distributed after such sale in accordance with facts yet to be determined, is a final decree. It disposes of the only issue, whether the lands should be divided in specie or sold and the proceeds divided. The Court cites in support of its rule, *Forgay v. Conrad*, 6 Howard, the case relied upon by Judge Marshall and by defendant to support the contention that the decree at bar is not final. So also a decree which determines the principal matter in controversy between the parties is final, although it directs certain accounts to be taken.

Dean v. Nelson, 7 Wall, 342.

A decree directing the sale of trust property and that the proceeds be brought into Court is a final decree.

R. R. Co. v. Bradley, 7 Wall, 575.

This whole question is reviewed in *McGourkey v. Toledo, Etc., R. Co.*, 146 U. S., 536.

In *Stovall v. Banks*, 10 Wall, 583, a decree was held to be final where a sum was adjudged to be due and execution

awarded, even though a deduction was permitted of the amount of any note held by defendant against plaintiff, and a deduction for fees.

Without question, there was a determination by the probate court of Ottawa County as to the liability of Edward P. Ferry. This liability was to some one. The Court did not sit to do an idle thing, to decide an abstract question of morals, but to determine pecuniary liability and award relief. This must have been in favor of the legatees and creditors of the estate of which defendant was executor, or it must have been in favor of the plaintiff in error as their Trustee. In either case the plaintiff was either a party or a privy.

This judgment or determination is final and conclusive so long as unmodified, and is binding as to all matters "put in issue by the pleadings," and determined. This is the very essence of the estoppel which arises from a judgment, as clearly laid down in

Southern Pacific Co. v. U. S., 168, U. S., 48, 49.

Applying this test, how can it be said that the judgment fails, as argued below by defendant and as intimated in the opinion of Judge Marshall. By what artifice could the plaintiff escape from the operation of this principle of estoppel if in some future litigation it should seek to hold E. P. Ferry to a greater or different liability? If such a case should arise, could it be said that the Michigan Trust Company was neither party nor privy to the judgment here sued upon?

By implication the defendant urged that one test of a valid judgment or decree is that at the moment of its entry every condition must exist for its immediate execution according to its terms. It is argued that at the very moment of its rendition two certainly distinguished persons or parties must exist standing on opposing sides of the controversy, whose rights are absolutely and accurately defined, or failing this,

no estoppel can ever arise, and hence no judgment exist. This is to mistake the attribute for the thing in which the attribute inheres. Estoppels spring from judgments, not judgments from estoppels.

No authority was cited by defendant's counsel for this novel view. It is true that upon the presentation of the demurrer to the original complaint this view was apparently taken by Judge Marshall. It was met in argument upon the hearing of the demurrer to the amended complaint. Whether he adhered to his views upon this question we are not advised.

We know of no reason why the condition subsequent that a written acceptance be filed may not properly be attached to a decree. Elasticity and adaptability to various conditions is characteristic of relief in chancery.

Even judgments are made to operate by relation as where a party dies during a trial, or between verdict and entry of judgment. Verdicts are taken subject to the opinion of the Court, and in various ways they are given force by relation, just as this decree of the probate court was made operative from its date by plaintiff's compliance with the requirement.

"There are some cases of decrees which, although they are final in their nature, require the confirmation of a further order of the Court before they can be acted upon. Of this nature are decrees in suits against infants, in which a day is given to the infant to show cause against it, after he attains twenty-one; and decrees where the bill is ordered to be taken *pro confesso* are also, sometimes, of the same description."

² Daniel Ch. Pl. & Pr., 997.

It is certain that bills taken *pro confesso* under the Act of March 3, 1875, are of this nature.

¹ Foster Fed. Pr., Sec. 323.

Can it be doubted that if, instead of appointing the plaintiff as the person to whom the money should be paid and requiring an acceptance of the trust, the Court had named no one, leaving the designation to be made by an order at the foot of the decree, the decree would have been final, and binding upon the defendant from its date?

Even if the decree of the probate court is erroneous, it can be modified only by appeal or writ of error. The decree in question certainly was not open to collateral attack. As well said by Van Devanter, Circuit Judge, in *Kretsinger v. Brown*, 165 Fed., 612, in discussing the validity of a decree of the County Court in Colorado:

"In so deciding it may have misconstrued the statute, and for that reason its decrees may have been open to reversal upon a direct proceeding, such as an appeal or writ of error; but the error, if there was such, does not detract in any degree from the faith and credit to which they are entitled when collaterally drawn in question."

It is said that the decree is not final because, among other reasons, it is not in favor of the Michigan Trust Company, either individually or as administrator *de bonis non*, and that the Company was not a party to the action in Michigan.

The Michigan Trust Company was a party petitioner in Michigan, having been appointed special administrator of the estate of William M. Ferry in Michigan, which appointment it accepted, and qualified as such administrator. And during the course of the litigation in Michigan, the trust company was appointed and qualified as administrator with the will annexed for the State of Michigan, of the estate of (Col.) William Montague Ferry, the son of William M. Ferry, who was a party in the accounting suit, and as administrator for Michigan of Mary L. F. Eastman, deceased inte-

state, and whose heirs and distributees were also parties petitioner in that suit.

Trans., pp. 6, 9.

Thus the Michigan Trust Company was a party to the litigation long before the decree now sued upon was rendered.

The Michigan Trust Company furthermore takes under the decree of the probate court and must take what the decree gives, no more, no less. The decree adjudges that Edward P. Ferry is indebted to the estate in a fixed sum. The legatees are estopped from bringing a new suit against the executor. They would be met by the plea of *res judicata*. If the decree had appointed any one of the parties petitioner, for instance, Amanda Harwood Hall, as administratrix *de bonis non*, in the place of Edward P. Ferry, removed, and ordered Edward P. Ferry to pay a certain sum of money to her, would not the judgment be in favor of a party to the action in such sense that Amanda Harwood Hall could sue upon it? To hold otherwise would be to decide that when legatees bring an action to have an executor removed, the estate not being ready to be settled, no judgment against the executor could be availed of by the administrator appointed in his stead, but the administrator would be compelled to bring an entirely new suit and establish what had already been established, to-wit, that the executor was indebted to the estate. Such is not the law, as the cases hereafter cited will show. The Michigan Trust Company in taking, under order of the Court, takes what the order gives and is estopped to bring another action against Edward P. Ferry. If the probate court had removed Edward P. Ferry and appointed the Michigan Trust Company in his stead, which company had thereupon filed its acceptance of the trust, and the Court had then rendered a money judgment against Edward P. Ferry, it would seem that there could be no objection raised to the

suit upon that judgment by the Trust Company. It does not seem that the right of The Michigan Trust Company to sue should turn upon the question of whether it was appointed before the judgment was given against Edward P. Ferry, or whether it was appointed in the very decree that rendered said judgment against defendant, nor would it make any difference when its acceptance was filed, so long as its action was brought after such filing. It is a well-known principle of equity that a trust will not be allowed to fail for lack of a trustee. In such case a court will appoint a new trustee, and even had the Michigan Trust Company failed to accept the appointment, the court could have appointed another administrator in its stead and it is not perceived why that administrator could not sue on the judgment. It is not open to a federal court in Utah to inquire whether it is proper practice in Michigan to render a judgment in favor of an administrator *de bonis non* rather than a legatee. The only question in this court is whether the court had jurisdiction to render such a judgment, and if its judgment is erroneous it can be attacked only upon appeal.

Comstock v. Crawford, 3 Wall., 396.

In which it is held that if an appointment of an administrator is irregularly made, the irregularity should be corrected on appeal.

Simmons v. Saul, 138 U. S., 439;

In which the Court said :

"But even if it be conceded that the requirements referred to above apply, we are of the opinion that, the jurisdiction of the subject matter having attached, no informalities as to notices, advertisements, etc., in the subsequent proceedings of the Court, can oust that jurisdiction. They are, at most, errors which could be cor-

rected on appeal, or avoided in a direct action of annulment as expressly provided in the articles of the code above cited, but cannot be made the grounds on which the decree of the Court can be collaterally assailed."

If this suit in Michigan had been in the name of the probate judge upon the bond of Ferry as executor, the moneys realized would, under the statutes of Michigan, be paid to the Michigan Trust Company as administrator *de bonis non* with the will annexed. By analogy, it would seem that a similar course is not improper when suit is brought, not on the bond, but on the decree or order of the probate court.

The case of

Moore *v.* Fields, 42 Pa. St., 467,

is an authority very much in point

In this case one Moore died domiciled in New York, and defendants applied to the surrogate in New York for and were granted letters of administration on his estate, giving bond conditioned that "they would obey all orders of the surrogate touching the administration of the estate committed to them." They then received \$10,000 assets of the estate and removed to Philadelphia without settling any administration account. Thereafter the surrogate removed them and appointed plaintiff, the public administrator, as administrator in their stead.

Defendants were then summoned to appear and settle their accounts. Upon their failure to do so, the surrogate stated an account, showing a balance in their hands of \$16,683.45, and ordered that they "do forthwith pay the said public administrator, as administrator of said estate, said sum of \$16,683.45." Plaintiff then brought suit on this decree in Pennsylvania against the removed administrators.

The Supreme Court of Pennsylvania in affirming judgment for plaintiff, said: "Under the Revised Statutes of

New York, the surrogate had jurisdiction of the parties and of the subject matter, and his proceedings appear to have been in due course of law. His decree, unappealed from, is conclusive between the parties. Conclusive of what? Conclusive of Fields's right to receive from the defendants so much money, and of their liability to pay him. It is of no moment that he is called administrator in the surrogate's record. Had he been called trustee for creditors and heirs, or had no title whatever been given him, his right to recover in our courts upon such a record would have been the same as it is now. A judicial decree that a man receive a certain sum of money from defendants, who were duly warned and fairly subject to the jurisdiction, entitles him to sue for it in a Pennsylvania court, with or without his official titles. That money was never subject to administration in Pennsylvania. It was an administered fund before it was brought here. It was held by the administrators in trust for the creditors and heirs of the decedent, in whom the beneficial interest had already vested; and when the court to which these trustees had submitted themselves decreed a payment over to another trustee, it was their duty to obey, as they had solemnly promised to do. . . . The fund in controversy was the product of assets that were never subject to our jurisdiction, and which were being administered in the jurisdiction to which they belonged."

The only relief asked in the proceeding in Michigan was for the removal of E. P. Ferry as executor, for an accounting and the appointment of plaintiff or some other suitable person as administrator *de bonis non* with the will annexed. The legatees did not ask to have the distribution of the estate among themselves decreed. The distribution to the devisees and legatees was a matter which properly came later. It is not proper practice for the federal court to determine whether the legatees should also have asked that the estate should be distributed, or to inquire whether at this time it could be dis-

tributed. They did not so ask, but they obtained that for which they did ask, and under these circumstances the decree is final.

Wing v. Warner (Mich.), 2 Doug., 288;
Brush Electric Co. v. Electric Co., 51 Fed., 557, 560;
French v. Shoemaker, 12 Wall, 86, 98.

Under these decisions a final decree is one which finally determines all of the issues presented by the pleadings. The Michigan decree complies exactly with these requirements.

While we contend that the finality of the decree must be tested solely by the laws and decisions of Michigan, yet the decisions of the Supreme Court of the United States are not without significance as showing the distinction drawn between final and interlocutory decrees.

Two cases selected for illustration from a large number are the following:

In the

Wabash and Erie Canal Co. v. Beers, 1 Black, 54,

the court held that a decree ordering money to be brought into court within a limited time, and warning defendants that if they failed, a particular measure would be taken to compel obedience, was final, and thereupon denied a motion to dismiss an appeal from such decree.

In

Winthrop Iron Co. v. Meeker, 109 U. S., 180,

minority stockholders of a corporation brought a bill to set aside certain proceedings of the majority and to have a receiver appointed to take possession of the property. The decree adjudged that a certain lease executed by the majority was a fraud on the minority and was null and void, and appointed a receiver to take charge of and manage the business of the company, and ordered defendants forthwith to

surrender to the receiver all the property of the company, and ordered the receiver to conduct the business until further order of the court; and further ordered an accounting before a master for all profits realized by the defendant directors. From this decree an appeal was taken. The court held, Waite, C. J., delivering the opinion,

"In our opinion the decree as entered was final . . . The whole purpose of the suit has been accomplished. . . . The litigation of the parties as to the merits of the case is terminated, and nothing now remains to be done but to carry what has been decreed into execution. Such a decree has always been held to be final for the purposes of an appeal. . . . Here the rights of the Hematite Co. and the defendant directors of the Iron Company have been adjudicated and definitely settled. Their lease, which was in reality the subject matter of the action, has been cancelled, and a delivery of the leased property to the Iron Company has been ordered. The complainants are entitled to the immediate execution of such a decree. The receiver to whom the delivery is to be made was not appointed to hold the property until the rights of the parties could be adjudicated, but to stand, subject to the direction of the court, in the place of, and as and for, the corporation, because, under the circumstances, the corporation is incapacitated from acting for itself. His position is like that of the guardian of the estate of an incompetent person. . . . In the words of Mr. Justice McLean, in *Craighead v. Wilson*, 18 How., 201, the decree is final on all matters within the pleadings, and nothing remains to be done but to adjust the accounts between the parties growing out of the operations of the defendants during the pendency of the suit."

The legal title to the personal assets of the estate was vested in the executor; a decree which removes him, divests him of that title, appoints a successor and directs payment to the successor is a final determination of his right to that office

and of his legal title to those assets. Even if as an individual legatee he were still on ultimate distribution of the estate to share in that distribution, the decree terminating his office and his title to and possession of personal property incident to said office, would be a final decree. It strips him, once and for all, of an office and a title: it confers that office and that title upon another.

That is just as true in the case of an executor who is also a legatee, as of an executor who is not a legatee. If the rights, the office and the title of executor are taken from one and given to another, there is a final judgment or order against the one deprived and in favor of the one to whom they are given, and the fact that the former may or may not on ultimate distribution become entitled to some part of the assets as a legatee, in no way affects the finality of the judgment.

But, as already shown, no distribution has as yet been sought by the petitioners. There is no issue raised as to the respective rights of the legatees among themselves. The assets when restored to the jurisdiction of the probate court of Ottawa County, and to the custody of plaintiff as the administrator appointed by it, may be applied and distributed without further litigation in the usual orderly manner.

We contend that the federal court is not called upon to determine whether the estate should have been distributed by the decree in question, and we further contend that if that issue were before this court, the distribution of a fund then resting in judgment would obviously have been premature.

The executor being adjudged indebted to the estate, payment of that indebtedness had to be made to somebody. It could not be made to the legatees for the estate was not finally closed. It could be made only to the successor of the removed executor, that is to the administrator with the will annexed, the present plaintiff.

Courts have heretofore found no difficulty in adopting this mode of procedure as a matter of course.

In

Mitchell v. Moore, 95 U. S., 587,

upon a bill in equity for the removal of defendant trustee, a decree was rendered against defendant removing him as trustee and adjudging that he pay the trust fund to a new trustee. Defendant appealed, assigning for error the ruling of the court that he was liable for the amount decreed against him and that the principal amount be paid to a new trustee.

In affirming the decree, Chief Justice Waite, delivering the opinion of the court, said :

"There is no specific prayer for the appointment of a new trustee, or the payment of the principal of the fund to him when appointed; but such relief is necessary, in order to carry into full effect an order for the removal of the old trustees."

In

Cavender v. Cavender, 114 U. S., 464,

upon a bill in equity praying that defendant might be removed from his office of trustee and a proper person appointed in his stead to whom he might be ordered to pay over the trust fund, the court made a decree removing the defendant as trustee, appointing one Glover in his stead, and directing defendant upon demand, to pay over to Glover, trustee, the trust fund and such sums of money as he had received and collected from the sales of land or otherwise since a certain date.

In affirming the decree of the court below, Woods, J., delivering the opinion, said :

"Upon the causes, as presented, with no explanation vouchsafed by the appellant (trustee), it is difficult to

conceive of a clearer case for the removal of a trustee and the appointment of another in his stead."

In

May v. May, 167 U. S., 310,

it appeared that by will plaintiff was appointed trustee of certain property. The *cestuis que trustent* were given power to remove him upon sufficient cause, which power they subsequently exercised, appointing one Dennis as trustee in his stead. Thereupon plaintiff filed his petition praying for an injunction against his removal, Dennis later being made a party defendant. Defendant filed a cross-bill praying that plaintiff be decreed to surrender possession of the property to Dennis as his successor. Upon hearing, it was decreed that plaintiff within twenty days surrender possession and control of the trust property to his co-trustee and to Dennis, and that he render a full and final account of all his receipts and disbursements. In delivering the opinion of the court affirming the decree, Gray, J., said:

"The direction, in the decree, that he should surrender possession and control of the trust property, and the leases and papers in his hands, and all moneys, whether derived from the collection of rents or otherwise, was a necessary incident of his removal and the appointment of a new trustee in his stead."

The relief asked for and granted in the Ferry case, the removal of the executor, the appointment of an administrator *de bonis non*, and the payment of the property of the estate in the executor's hands to the administrator, is precisely the relief granted in these three cases, and the Supreme Court not only affirms the decree, but remarks that the payment by the removed trustee to the new trustee

"is necessary, in order to carry into full effect an order for the removal of the old trustees."

and

"The direction in the decree that he should surrender possession . . . of the trust property . . . was a necessary incident of his removal and the appointment of a new trustee in his stead."

In New Jersey the proper practice when an executor is removed is to decree that such executor shall deliver all the property of the estate to the administrator appointed in his stead.

Lett v. Emmett, 37 N. J. Eq., 535;
Gray v. Gray, 39 N. J. Eq., 332.

In both these cases the executor appealed from the decree ordering his removal and the payment of the estate to the administrator, and in both the decree was affirmed. No question was even raised as to the decree not being final.

In Illinois several decisions relating to the estate of one George Wincox were made in

Estate of Wincox, 85 Ill. App., 613 (1899);
Salomon v. People, 89 Ill. App., 374 (1899);
McDonald and Salomon v. Holdom, 99 Ill. App., 656 (1902);
Salomon v. People, 191 Ill., 290 (1901).

From these it appears that the probate court of Cook County in 1894 appointed Joseph Salomon administrator *de bonis non* to collect said estate. On February 11, 1897, said court appointed Holdom as administrator of said estate, and he qualified. The same order directed Salomon to settle his account with the estate. He filed an account charging himself with a balance which, by order of January 28, 1898, was found due from him to the estate, and he was directed to pay it to the administrator.

Upon objections filed to Salomon's final account, the court on February 8, 1898, by order, found Salomon indebted to

the estate in the further sum of \$6,192.06, and directed him to pay it to the administrator. From this order he appealed to the circuit court and furnished an appeal bond, afterwards sued on.

The statute (1 Starr and Curtis's Annotated Illinois Statutes, Ch. 37, Sec. 259, p. 1179), permitted appeal only from "final orders, judgments, and decrees of the probate court," and provided that upon such appeal the case be tried *de novo*.

The circuit court after such trial *de novo* made its order that Salomon "administrator to collect," *etc.*, do forthwith pay to Holdom, administrator, \$6,249.25 with costs. Salomon then appealed to the appellate court and furnished an appeal bond, also afterwards sued on.

That court affirmed the circuit court order and Salomon appealed to the supreme court. In suit subsequently brought against Salomon and his sureties on the first appeal bond, the appellate court, reviewing the facts, and after stating that Salomon became "*functus officio* as administrator to collect by the appointment of a general administrator," says:

"There was, as shown by the plea, a final adjudication as to the \$6,192.06 by the probate court,"
(89 Ill. App., 381; *supra*),

and then dismisses as "certainly novel" Salomon's objection that he can not pay the amount so "finally adjudicated to be due, because at some future time an additional amount may be adjudicated to be due." It affirms the circuit court; and is in turn affirmed by the supreme court in 191 Ill., 290, (*supra*).

Later, in the appellate court, in suit on his second appeal bond, Salomon contended (first) that the circuit court had entered judgment against him as administrator to collect, thereby compelling him to give the bond sued on which was not authorized by law; and (second) that the appellate court had not affirmed the judgment of the circuit court. Of these

defenses, the appellate court said, through Presiding Justice Windes: "He (Salomon) had been removed as administrator to collect and was indebted to the estate. The judgment is, as it should be, against him as an individual and in favor of the estate." And again: "Moreover appellants by the appeal bond from this court to the supreme court, under their own signatures, state that the judgment of the circuit court was affirmed by this court. They will not now be heard to deny the fact."

McDonald v. Holdom, 99 Ill. App., 659 (*supra*).

Here is persuasive authority from the courts of a state bordering on Michigan which bears on several points in controversy in the case at bar.

In substance the law of Illinois as here declared is:

A probate court order made on objections to a final account, finding an administrator to collect (then *functus officio*) indebted to the estate in a certain sum and directing him to pay it to his successor, is a final order and appealable. It is a "final adjudication" even though he might later be required to pay more. A judgment against "S. Administrator to collect," finding such indebtedness and directing such payment to the successor, is a judgment against the individual and in favor of the estate represented by the successor. A party will not be heard to deny in one suit his statement previously made in an appeal bond in another suit, as to the nature of the judgment appealed from.

Plaintiff could have sued on the decree in Michigan.

It is well settled doctrine that an action of debt will lie in a court of law upon the decree of a domestic court of equity, where such decree directs the payment of a fixed, liquidated and absolute debt.

After the decree of the Michigan Probate Court was rendered there remained nothing for the executor to do but to pay the amount specified in that decree to The Michigan Trust Company.

Action could have been brought on his bond, or against him personally.

Storer v. Storer, 6 Mass., 390.

The laws of Michigan allow action to be brought upon judgments in all cases.

Gooding v. Hingston, 20 Mich., 439.

(3) *General jurisdiction of the probate court and presumptions supporting its decree.*

The probate court was a court having jurisdiction of probate matters and settlement of estates, and in such matters was a court of general jurisdiction.

People v. Wayne Circuit Court, 11 Mich., 393;
Church v. Holcomb, 45 Mich., 29;
Alexander v. Rice, 52 Mich., 451;
Morford v. Dieffenbacker, 54 Mich., 593;
Schlee v. Darrow Estate, 65 Mich., 362;
Fingleton v. Grove, 116 Mich., 211;
Reason v. Jones, 119 Mich., 672.

These decisions are so uniform that we quote from one only, where Chief Justice Cooley said in *Morford v. Dieffenbacker*, *supra*:

"The probate courts of this state are courts of general, and for the most part of exclusive, jurisdiction in ~~probate~~ matters."

In view of these repeated holdings, the rule laid down in *Robinson v. Fair*, 128 U. S., 53,

applies to the case at bar. There it is held that as the probate courts of California, by the decisions of the Supreme Court of that state, are courts of general jurisdiction in probate matters, a decree of such probate court will be presumed by the federal court to be correct, and every intention will be indulged in its support.

In *Grignon's Lessee v. Astor*, 2 How., 319,

it was held by this Court that a county court in Michigan (then the probate court) is a court of general jurisdiction whose judgment imports verity.

A court of general jurisdiction is presumed to act rightly.

Galpin v. Page, 18 Wall, 350, 365;
Hanley v. Donoghue, 116 U. S., 1.

The court below cites two Michigan cases from respondent's brief as indicative of limitations upon the jurisdiction of the probate courts.

One citation was from

Holbrook v. Cook, 5 Mich., 229.

The only issue in that case was whether writ of error would lie from the Supreme Court to the Circuit Court for review of an order by the latter vacating an alleged order of the probate court which purported to remove an administrator *nunc pro tunc*.

The Circuit Court was unquestionably of general jurisdiction in law and in equity; but the Supreme Court here held that its order vacating such a *nunc pro tunc* removal below was in no sense a final order, but merely "an interlocutory order or discretionary ruling" (page 231).

The other citation was from

Detroit L. & N. R. Co. v. Probate Judge, 63 Mich., 676,

with quotation of the following words:

"The jurisdiction over contentious litigation belongs, under the Constitution, to courts of law and equity."

Here the question involved was the condemnation of a crossing by one railroad over the right of way of another railroad, under special statutory devolution of certain powers upon the probate court. There was no question involved relating to its jurisdiction over settlement of estates or in other probate matters; a jurisdiction which Chief Justice Cooley had declared to be "general and for the most part exclusive." (*supra*, page 38.)

(4) *No fraud in procurement of the decree and no conflict with record.*

No fraud in the procurement of the probate court decree is even suggested, and no conflict with the record in that court was made to appear in the Circuit Court in Utah. The record was not before that court.

Here, then, was a final judgment of a state court of competent jurisdiction rendered in exercise of adequate jurisdiction of the person and subject-matter for some purposes, as the Circuit Court of Appeals decides, (and, as we contend, for all purposes) without fraud in the procurement, disclosing no conflict with the record, to which full faith and credit, as construed under the statutes and decisions of Michigan, was denied by the federal courts below in the following particulars:

A. AN EXECUTOR, WHEN CALLED TO ACCOUNT BY THE PROBATE COURT IN MICHIGAN, THAT BEING THE COURT OF HIS APPOINTMENT, MUST RENDER A TRUE AND CORRECT ACCOUNT OF ALL ASSETS WHICH HAVE COME TO HIS HANDS AS EXECUTOR.

The Michigan statutes are so clear and concise that a mere reading of their text should be convincing.

(References are to the Compiled Laws of Michigan, 1897. Italics are ours.)

Sec. 9428: "Every executor and administrator shall be chargeable in his account *with the whole of the goods, chattels, rights and credits of the deceased, which may come to his possession; also, with all the proceeds of the real estate which may be sold for the payment of debts and legacies, and with all the interest, profit and income which shall in any way come to his hands from the estate of the deceased.*"

Sec. 9429: "Every executor and administrator shall account for the personal estate of the deceased, as the same shall be appraised, except as provided in the following sections."

Sec. 9430: "An executor or administrator shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the personal estate; and he shall account for the excess, when he shall sell any part of the personal estate for more than the appraisal, and if he shall sell any for less than the appraisal, he shall not be responsible for the loss, if it shall appear to be beneficial to the estate to sell it."

Sec. 9435: "When an executor or administrator shall neglect or unreasonably delay to raise money by collecting the debts or selling the real or personal estate of the estate of the deceased, or shall neglect to pay over the money he shall have in his hands, and the value of the estate shall thereby be lessened, or unnecessary cost or interest shall accrue, or the persons interested shall suffer loss, the same shall be deemed waste, and the damages sustained may be charged against the executor or administrator in his account, or he shall be liable therefor on his administration bond."

Under these sections, the executor is clearly chargeable in his account with all personality which shall have come to

his possession, with the proceeds of all realty sold by him, with all increase above appraisal, and with all profit and income which shall have come to his hands, and if through his neglect of duty loss is sustained by persons interested, this is deemed waste and the damages sustained may be charged against him in his account.

Such accounting must be had in the probate court which appointed him.

Article VI., Sec. 13, of the Constitution of Michigan provides:

"In each of the counties organized for judicial purposes there shall be a court of probate. . . . The jurisdiction, powers and duties of such court shall be prescribed by law."

Sections of Michigan statutes provide as follows: (All references are to Compiled Laws of Michigan, 1897. Italics are ours.)

646. "Every judge of probate shall hold a probate court in his county. . . ."

647. "Every probate court shall be a court of record and have a seal . . ."

650. "The judge of probate for each county shall have power to take the probate of wills, . . . and shall have and exercise all such other powers and jurisdiction as are or may be conferred by law."

651. "The judge of probate shall have jurisdiction of all matter relating to the settlement of the estates of such deceased persons, . . ."

9345. "It shall be the duty of the judge of probate . . . to notify and require all persons appointed executor or administrator of any estate, . . . within his county, to appear at his office within one year from the date of their appointment . . . and at least once each year thereafter during the con-

tinuance of the administration . . . and at such other times as he may direct, and render unto him an accurate account of all moneys and other property in his hands as such executor . . . *and the proceeds and expenditures thereof.*"

9346. "The judge of probate shall give at least two weeks' notice of the time and place of meeting for the purpose of hearing and examining such account, which notice shall be given by personal service on all persons interested, *or by publication under the direction of the said judge of probate.*"

9441. "Before the administration account of any executor or administrator shall be allowed, notice shall be given to all persons interested, of the time and place of examining and allowing the same; and such notice may be given personally, to such persons as the probate court shall judge to be interested, or by public notice, under the direction of the court."

9435 (*supra* p. 41).

9436. "Every executor . . . shall render his account of his administration within one year from the time of his receiving letters testamentary . . . unless the court shall give permission to delay . . . ; and he shall render such further accounts of his administration from time to time, as shall be required by the court, until the estate shall be wholly settled; and he may be examined on oath upon any matter relating to his account."

688. "When notice of any proceedings in a probate court shall be required by law, or be deemed necessary by the judge of probate, and the manner of giving the same shall not be directed by any statute, the judge of probate shall order notice of such proceedings to be given to all persons interested therein in such manner, and for such length of time as he shall deem reasonable."

9311. "Every executor . . . shall give bond . . . with conditions as follows:



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2. To administer, according to law and to the will of the testator, all his goods, chattels, rights, credits and estate, which shall at any time come to his possession, or to the possession of any other person for him, and out of the same pay and discharge all debts, legacies and charges, chargeable on the same, or such dividends thereon, as shall be ordered and decreed by the probate court;
3. To render a true and just account of his administration to the probate court within one year, and at any other time when required by such court;
4. To perform all orders and decrees of the probate court, by the executor to be performed in the premises."

Such bond was given by the executor. (Trans. pp. 9, 13.)

653. "The several judges of probate shall have power to issue all warrants and processes in conformity to the rules of law which may be necessary . . . to carry into effect any order, sentence or decree of the probate courts, or the powers granted them by law.

That the statutes refer to *all assets* we have directly in point:

Hall v. Grovier, 25 Mich., 428;

There an administrator received money which in fact belonged to the estate of the decedent as he was reliably informed before rendering his final account. It was held to be no excuse for his neglect to charge it in his administration account in the probate court that at the time he so received it he did not know that it belonged to the estate, but supposed in good faith it belonged to the widow of the decedent, for whom he received it and to whom in effect he turned it over.

On page 432, the Court, by Mr. Justice Graves, states:

"If the money, when Hall [administrator] received

it, belonged to the estate, and if, before he rendered his account, he ascertained, or had reason to believe, that it was the property of the estate, it was certainly right that he should be charged with it in his account.

In contemplation of law it was still in his hands. His ignorance of the true title, if he was ignorant of it, when he received the money, had not led to its application under the trust in some way foreign to the legal destination, and no fact was shown or suggested, of a nature to excuse him as an administrator, from being debited with the amount."

On page 436, the Court further states:

"The object of a settlement is not merely to ascertain what items ought to be placed on the debit side of the administrator's account, subject to evidence on a future proceeding, that he ought not to have been charged therewith as between himself and the estate. Its scope is more comprehensive and complete.

The end to be accomplished is to *judicially liquidate and settle the affairs of his trust, and determine the rights of the estate as against him, and his rights as against the estate, and the proceeding involves an adjudication upon each item.* Parties interested may surcharge, or falsify the account, and the administrator may proceed by discharge, and defense. The dispute, if any, may turn upon the introduction and allowance of new items, or the allowance of old ones. Evidence may be produced on each side, so far as necessary, and when the hearing is closed, the court must adjudge what to allow and what to disallow, and settle the particular account. When the determination is made, the account adjudicated upon is settled on both sides."

The court in question was the probate court, and the ruling laid down in that case was strictly followed by the probate court in the case at bar.

See also:

Grovier v. Hall, 23 Mich., 7, 10.

It is thus apparent that the probate court found full warrant in the Michigan statutes and decisions for doing what it did and for finding in paragraph IX of its decree that the estate had not been fully administered and "that it was and is the duty of said Edward P. Ferry to render a true and perfect account of his doings as executor, but that he has neglected and refused to do so." (Trans., p. 12.)

The Michigan doctrine is also in accord with that recognized by Mr. Story and by the federal courts, including this Court.

Story on Conflict of Laws, Sec. 514b (7th Ed.):

"It is not easy to perceive how he can be suable in such state [state other than that of his appointment] for such assets in his hands received abroad by him under the sanction of the foreign administration and by the authority of the foreign government to which he is thus accountable for *all such assets*."

In *Lewis v. Parrish*, 53 C. C. A., 77, 115 Fed., 285, 287,

the court says:

"An executor or administrator is exclusively bound to account for *all of the assets* which he receives under and by virtue of his administration to the proper tribunals of the government under which he derives his authority."

This closely follows the leading case of

Vaughan v. Northup, 15 Peters, 1,

where the Court, by Mr. Justice Story, at page 5, said:

"On the other hand, the administrator is exclusively bound to account for all the assets which he receives

under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of other states have no right to interfere with or to control the application of those assets according to the *lex loci*."

In *Yonley v. Lavender*, 21 Wall., 276, 280,

this Court said that an estate upon the death of the decedent

"was thereafter in the contemplation of law in the custody of the probate court, of which the administrator was an officer,"

B. ASSETS WHICH HAVE COME INTO THE POSSESSION OF THE EXECUTOR AND WHICH HAVE BEEN MISAPPROPRIATED BY HIM ARE NOT, UNDER THE LAWS OF MICHIGAN, "ADMINISTERED" ASSETS.

Despite the clear tenor of the statutes and decisions cited in the foregoing subdivision (A) the Circuit Court of Appeals recognizes no jurisdiction of the probate court as to accounting by the executor except

"to adjudicate whether or not he should account for the unadministered assets of his father's estate, [and] the true state of that account." (Trans., p. 34.)

[NOTE.—The word "unadministered" appears incorrectly as "administered" in the Transcript. See 175 Fed., 674, and Transcript accompanying petition for certiorari.]

And that court further declares that in Michigan, as at common law,

". . . property [of the deceased] which has been mixed with that of the former executor or administrator, or which has been converted to his individual use, or into another form, in short all property of the deceased which does not remain in specie is administered and not unadministered property." (Trans., p. 36.)

The same misapprehension permeates the entire opinion and seems to form the chief basis for the conclusions there reached.

It is disclosed in its comment upon the notice to the executor, as alleged in the amended complaint (Trans., pp. 29, 31, 32, 34, 39), and upon the following statutes: (Trans., p. 37.)

9318. "When an executor shall die or be removed, or his authority shall be extinguished, the remaining executor, if there be any, may execute the trust; and if there shall be no other executor, administration, with the will annexed, may be granted of the estate not already administered."

9332. "When any sole executor or administrator shall die, without having fully administered the estate, the probate court may grant letters of administration with the will annexed, or otherwise, as the case may require, to some suitable person, to administer the goods and estate of the deceased, not already administered."

These statutes should be read in connection with

9335. "An administrator, appointed in the place of any former executor or administrator, for the purpose of administering the estate not already administered, shall have the same powers, and shall proceed in settling the estate in the same manner as the former executor or administrator should have had or done; and may prosecute or defend any action commenced by or against the former executor or administrator, and may have execution on any judgment recovered in the name of such former executor or administrator."

Sec. 9400. "When an executor or administrator shall die or become incapable of discharging his trust, and a new administrator of *the same estate* shall be appointed, the probate court"

The word "unadministered" made its first appearance in

the amended complaint in reference to the order and notice served upon the executor as being, *inter alia*, to

"account forthwith to said court for the residue of said estate which was unadministered." (Trans., p. 3.)

The word had been used in its legal effect under Michigan jurisprudence and did not purport to give the order and notice verbatim. The copy of the decree attached to the amended complaint, and forming part of it, recited the petition as being

"for an accounting by said executor." (Trans., p. 8.)

The order itself recited the petition as praying

"that he or his representatives be ordered to account forthwith to this court *for the estate* of said deceased down to the date of said accounting." (Trans., p. 47.)

It follows that the executor was not misled by the notice as to the scope of the accounting which was sought from him.

The Michigan statutes already cited demonstrate that the executor was bound to account in the probate court for all assets, and not merely "unadministered" assets, as the Circuit Court of Appeals construed that term, and we shall now submit authority to support our position that in Michigan no assets are "administered" until they are rightly administered.

Directly in point is

Lafferty v. The People's Bank, 76 Mich., 35,

where the Court, at page 50, declares:

"Under our statutes, *the assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testa-*

tor, and until it is fully administered, the probate court has jurisdiction in the matter of the proceedings, and in this case it was competent for the court to require the executrix to file a new bond and to remove her for failure to comply with the order."

This meaning of the word was so obvious that the Michigan Supreme Court made no citations in connection with its ruling.

In *Hall v. Grovier*, 25 Mich., 428, 432,

the Court, speaking of a misappropriated asset, says:

"In contemplation of law it was still in his hands."

In *Brown v. Forsche*, 43 Mich., 492, 500,

the Court said:

" . . . The administrator fully administers when he allows them [distributees] to take it in the proper proportions."

In *Buss v. Buss Estate*, 75 Mich., 163,

the Court, at page 166, said:

"An estate cannot be held to be fully settled, and the executor's or administrator's duties as such closed, until he has paid the debts of the estate and the legacies provided for in the will, and filed with the judge of probate, in some form, evidence of these facts."

So also

In re Sanborn's Estate, 109 Mich., 191,

where the Court says:

" . . . before the executor can discharge himself of his official responsibility, he must do some act to change the character of his holding, and show that the fund is placed safely where it ought to be. This ques-

tion has been considered by the courts of many of the states, and this duty is recognized in the better reasoned of the cases in which the question has been raised. *In re Hood's Estate*, 98 N. Y., 363; *In re Higgins' Estate* (Mont.), 39 Pac., 506; *Hall v. Cushing*, 9 Pick., 395."

In *Ward v. Tinkham*, 65 Mich., 695,

the administrator invested funds of the estate in a lumber business, after receiving the consent of the widow thereto. The items were disallowed in his account, the court stating (p. 704) :

"The question which arises in the settlement of the final account of an administrator involves his official acts in collecting, controlling, and management of the estate, the *disposition of the proceeds, and the balance on hand* belonging to the estate awaiting distribution."

The Michigan probate system was taken from Massachusetts, and with it under the familiar rule was taken the construction placed by the Massachusetts decisions upon the statutes of that State.

Campau v. Gillett, 1 Mich., 416.

In *Hall v. Cushing*, 9 Pick., 395,

(Cited above in *Sanborn's Estate*, 109 Mich., 191),

the question was raised whether an executor who fails to invest proceeds of the sale of personal property would thereby render himself liable because of his having engaged to "administer according to the will" of the testator, and the report of the case, page 397, indicates that the executor himself conceded that :

"The duties of an executor are to collect the personal estate of his testator, convert it into money, pay debts, legacies and charges, and distribute the residue *according to the will*."

In Ipswich Co. v. Story, Exr., 46 Mass., 310,

Chief Justice Shaw said (p. 313) :

"It is not now necessary to consider the old rule, that a testator, by making a debtor his executor, released his debt. That rule has been qualified, to a great extent, in England, and has never been in force here. It is now understood, that when an executor or administrator was indebted to his testator or intestate, at the time of his decease, although the right of action cannot exist, because a man cannot sue himself, yet the debt is not considered as extinguished in any way, but rather to be accounted for as paid. *In other words, the debt becomes, prima facie, assets in the hands of the administrator or executor, to be accounted for and adjusted in probate account, as assets actually realized.* Wankford v. Wankford, 1 Salk., 299. Cheetham v. Ward, 1 Bos. & Pul., 630. Freakley v. Fox, 9 Barn. & Cres., 130. Winship v. Bass, 12 Mass., 199. Stevens v. Gaylord, 11 Mass., 267. It proceeds upon the ground that when the same hand is to pay and receive money, that which the law requires to be done shall be deemed to be done, and therefore that such debt due from the administrator shall be assets *de facto*, to be accounted for, in probate account. Such presumption would arise from the mere taking of administration."

See also Tarbell v. Jewett, 129 Mass., 457, at page 461, *et seq.* and cases there cited.

Woerner, in his work on the American Law of Administration, Vol. I., page 9, says of administrators :

"The sum of their activity is called administration, which, in its narrowest legal sense, is the collection, management, and *distribution*, under legal authority, of the estate of an intestate"

and then cites Webster, as follows :

"The term *administration*, in its primary significa-

tion and general sense equivalent to *conduct, management, distribution, etc.*, is also applicable to the management of the estates of minors"

And so in the Michigan statute (Sec. 9318) above cited (p. 48), providing for grant on the death of a former executor or administrator, of "letters of administration of the estate not already administered," and in Sec. 9332 providing that when a sole executor "shall die without having *fully* administered the estate," letters may be granted to some suitable person to administer the estate "not already administered," the meaning and construction of the phrase should be governed by the ruling in

Lafferty v. The People's Bank, supra,

for if this statute has one meaning and construction in Michigan and another in Utah, if it has one meaning in the courts of Michigan and another in the courts of the United States, endless conflict and far-reaching injury to distributees and legatees must ensue.

The case of

United States v. Walker, 109 U. S., 258,

cited by the Circuit Court of Appeals, does not seek to establish the general law, but confines its adjudication to the law as it existed at that time in the State of Maryland, for, says the Court :

"It may be conceded that the words 'unadministered assets,' as used in the statutes, have sometimes been construed to include the proceeds of assets sold or collected and not accounted for or paid over; and that an administrator *de bonis non* might call a removed administrator to account for such proceeds."

It should be borne in mind that this accounting in the probate court of Michigan was not in a suit by an admin-

istrator *de bonis non* against the former executor, but was the outcome of a petition by the residuary legatees and devisees calling him to account.

C. DUE COGNIZANCE SHOULD BE TAKEN OF THE FORCE AND EFFECT OF THE NOTICE BY THE PROBATE COURT, DULY SERVED ON THE EXECUTOR PERSONALLY AND BY PUBLICATION, FIXING DATE FOR EXAMINATION OF HIS ALLEGED FINAL ACCOUNT THEN BEFORE THE COURT, TOGETHER WITH THE STATEMENTS FILED BY THE PETITIONERS THEREIN.

As we read the opinion of the Circuit Court of Appeals, it entirely loses sight of two very significant features in the probate court proceedings.

The court below has held that the executor was properly before the probate court for some purposes. He was there represented by counsel, guardian *ad litem* and next friend, supporting his cross petition and participating in the trial which began in 1903.

One of these features was that in the course of that trial the probate court made its interlocutory order, requiring the executor to file a more detailed statement of account of his receipts and disbursements on account of the estate, including the disposition made of the properties on hand at the date of his second annual account, and of any other properties belonging to said estate not already accounted for by him in that court. The executor resisted and refused to comply. (*Supra*, p. 5.) (Trans., p. 9.)

Stevens v. Kirby, 156 Mich., 526.

Upon that refusal the probate court permitted the petitioners to put in further proofs showing his disbursements for the estate and the credits which should be allowed him. (Trans., p. 9.)

The second significant feature is that after these proofs were in, the probate court in 1907 ordered notice to be given that, upon a day fixed, the account, as the petitioners claimed it to be, would be submitted to the court for examination and approval, and that petitioners would then apply for leave to charge, surcharge and falsify the alleged final account of the executor then before the court and to file amendments and objections thereto, and would then move the court for a final decree on the merits of said account. (Trans., pp. 9, 10.) This order was duly published under the Michigan statutes (Secs. 688, 9346, 9441, *supra*, p. 43), and personal notice was also given the executor and his Utah guardians by personal service in Utah, all in precisely the manner which the Circuit Court of Appeals held sufficient in respect of the order and notice of 1903, made at the inception of the accounting proceeding. It was, therefore, of equal dignity and effectiveness. It served to apprise the executor, as well as his counsel, guardian *ad litem* and next friend, who were conversant with all the proofs and knew the state of account resulting from them, of just what kind of relief would be sought from the executor, of the balance charged against him individually in "the account as the petitioners claimed it to be," and of the resulting individual liability of the executor under the Michigan statutes and decisions cited elsewhere in this brief.

On the day set, petitioners and counsel for the executor appeared, the procedure forewarned by the notice was followed, the accountant for the petitioners was cross-examined, and the final decree was entered.

In

Stevens *v.* Kirby, 156 Mich., 526, rendered at one stage of this litigation, the Supreme Court of Michigan declared that the proper procedure was followed, and that the probate court had power to settle the account in this way.

The court said, speaking through Grant, P. J.:

"Three questions were involved in the original petition and answer: (1) The removal of the executor; (2) his liability to an account; and (3) an accounting. It was entirely proper for the court to take testimony upon these questions, and decide them by one decree."

In *McLean v. Speed*, 52 Mich., 257,

Chief Justice Cooley said (p. 259):

"It is a familiar principle that when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of"

So also

In re Axtell, 95 Mich., 244.

The opinion of the court below recites the finding in the probate decree that the estate had not been fully administered, and that it was and is the duty of Edward P. Ferry to render a true and perfect account of his doings as executor, but apparently attaches no importance to these findings when reaching its conclusion that the account was confined to assets "unadministered," as that word is defined in its opinion. If nothing else in the way of process had sufficed to bring a full accounting for all assets, whether converted or not, within the limits of the probate court statutory jurisdiction, service upon Edward P. Ferry, in the statutory way, of this order of March 6th, 1907, unquestionably sufficed, and the decree sued on was not rendered until December 31, 1907.

D. A PROCEEDING FOR AN ACCOUNTING BY THE EXECUTOR IS INCLUSIVE OF THE MAKING OF AN HONEST STATEMENT OF THE ITEMS WITH WHICH HE SHOULD BE CHARGED AND CREDITED, THE STRIKING OF A BALANCE, AND THE PAYMENT IN FULL OF THAT BALANCE, IF AGAINST THE EXECUTOR.

This statement would appear almost axiomatic were it not for the conclusions which the court below has reached, based on its erroneous impression of what constitute "assets unadministered" under the law of Michigan.

If that term be construed as the Supreme Court of Michigan construed it in

Lafferty v. People's Savings Bank, 76 Mich., 35, 50,

then indeed the court below has recognized in terms, but denied in effect, the jurisdiction of the probate court to do just what it has done by its decree, viz: "to adjudge the true state of the account of the assets of an estate in the hands of an executor and to require him to pay or deliver them to his successor." (Trans., p. 35.)

But the court below has held in effect that as to any assets no longer *in specie* in the hands of the executor, he need not account in probate court, nor can he be compelled by the probate court to make good the deficit. His obligation under the statutes, the will, his oath and his bond, would be satisfied by a statement showing so much (in detail) received, so much (in detail) duly expended or applied, and the residue converted to his own use. As to this residue no details, no "accounting," no reparation,—a palsy fallen upon the probate court.

However this may be elsewhere, it is not true in Michigan. That State recognizes an individual responsibility and liability of the executor in the court of his appointment for the due discharge of his solemn trust, the most sacred which can devolve upon man. The living can protect their own.

The dead leave their estates to the protection of the proper tribunal, and that protection does not fail just where it is most needed, that is, where its officer, the executor, administrator or guardian, becomes delinquent or dishonest. In Michigan, as in many other states, an accounting means more than the filing of a written statement showing gaps in blank where the estate has been depicted. It not only includes the rendition of an itemized statement of debts and credits, but also the striking of a balance and the liquidation of that balance if it appears to be against the executor. The two words "account" and "liquidate" are virtually synonymous in such a proceeding, and here again directly in point is:

Hall v. Grovier, 25 Mich., 428,

where the court, at page 436, states:

"The end to be accomplished is to judicially liquidate and settle the affairs of his trust and determine the rights of the estate as against him, and his rights as against the estate, and the proceeding involves an adjudication upon each item."

(See further citation on pp. 44, 45 of this brief.)

So also is

Pyatt v. Pyatt, 46 N. J., Eq., 285,

directly in point. In that case a guardian had continued to manage his ward's property after the ward had attained full age, and it was urged that the orphan's court had no jurisdiction over matters occurring between the parties after the ward became of age. The court rejected this contention, holding that the orphan's court had jurisdiction over the entire account and that this jurisdiction included the power to ascertain what property of the ward remained in the

guardian's hands at the time of accounting and to decree and enforce the surrender and payment to the ward of such remnant. The court quotes with approval a New York case as follows:

"In *Seaman v. Duryea*, 11 N. Y., 324, the New York Court of Appeals, speaking of the jurisdiction of surrogate's courts, which had been granted by terms similar to those employed in our orphans' court acts, said: 'It was the intent of the legislature, in conferring this jurisdiction upon surrogates, to provide an inexpensive and summary process for the settlement and adjustment of the accounts of guardians, and to supersede the necessity of a resort to the court of chancery for that purpose. In other words, for all the purposes of settling accounts between guardians and wards, and finally adjudicating thereon, the surrogate's court was invested with all the jurisdiction which had before been exercised by the court of chancery, to be exercised, however, in the cases and in the manner prescribed by statute; and while surrogate's courts can only exercise the jurisdiction expressly conferred upon them, the statutes, being remedial and for the advancement of justice, should receive a favorable construction, and such as will give to them the force and efficiency intended by the legislature. . . . If the powers of the surrogate should be restricted to requiring the guardian to render an account of his doings, which may in a limited sense be held to be an accounting, or if it should be held that the surrogate is invested with power to examine the account rendered, allow and disallow items, and finally adjust and settle the same, and strike a balance, without power to decree the payment of such balance, the remedy will come far short of that afforded by the court of chancery, and the legislature will have failed to provide the substitute they designed. The parties pursuing will be compelled to resort to another court by an independent action, to obtain the relief which before would have been had in one action. . . . The accounting to which a guardian may be subjected, by proceedings before the

surrogate, is not only a statement of his receipts and disbursements, with the amount of the trust fund still remaining in his hands, but it is, in addition to such account stated, a rendering and giving up to the party entitled of the moneys and property in respect to which the accounting party is liable. *The payment is a part of the accounting.* The surrogate has authority to compel the guardian to account, which includes the payment of any sum which may be found in his hands, and necessarily implies power to make the necessary order or decree in the premises.'

"The good sense of these remarks is conspicuous, and they are as true in regard to our orphans' court, with its present powers, as to the surrogate's court in New York."

See also

Cushman v. Richards, 100 Mass., 232-233;
State v. Williams, 77 Mo., 463.

The Court below observes that the surrogate's court in New York and the orphans' court in New Jersey were authorized by statute to exercise chancery powers over guardians and administrators and to issue execution to enforce their decrees, which by virtue of those statutes created the same liens and priorities as the judgments of other courts, and declares that *Pyatt v. Pyatt* and *Seaman v. Duryea* are not authoritative in the case at bar because, as it says, the orders and decrees of probate courts in Michigan create no liens and may not be enforced by execution. (Trans., p. 40.)

Here again reference may be made to the leading case of

Mills v. Duryee, 7 Cranch, 481 (2 Curtis, 631) (*supra*, p. 12),

where Mr. Justice Story, in expounding the "full faith and credit" doctrine said, at p. 485:

"The right of a court to issue execution depends upon its own powers and organization. Its judgments may be complete and perfect and have full effect, *independent of the right to issue execution.*"

It should be noted that the definition of the word "accounting" made in *Pyatt v. Pyatt* and *Seaman v. Duryea* does not rest upon any statute.

In *Pyatt v. Pyatt, supra*,

the New Jersey court first reviews the statutes which vest in the orphans' court full power to determine all controversies respecting allowance of accounts of executors and guardians, authorize it to issue process to compel such persons to account and to obey its orders, accord lien to its decrees for payment of money, and provide for issuance of execution thereon, and then says:

"This language, we think, imports that the orphans' court may require executors, guardians to render accounts of the estates committed to them, and may ascertain the condition of the estate in their hands, upon such accounting, as fully as can the court of chancery."

This is followed by reference to some decisions of the court of chancery, and the New Jersey court then adds:

"*Another consideration leads to the same conclusion,*"

and proceeds to cite from and comment upon *Seaman v. Duryea* as to what is involved in an accounting. We have seen that the Michigan probate court has power to require such rendition of accounts.

Sec. 9345, p. 42, *supra*.

It also has in such matters full chancery powers.

Sec. 651. "*The judge of probate shall have jurisdiction of all matters relating to the settlement of the estates of such deceased persons, and of such minors, and others under guardianship: Provided, however, that the jurisdiction hereby conferred shall not be construed to deprive the circuit court in chancery, in the proper county, of concurrent jurisdiction as originally exercised over the same matters.*"

The extent of this equitable power is seen in the fact that the administrator of one who has filled the office of executor or administrator may be held to account in probate court. It was so held in

Tudhope v. Potts, 91 Mich., 490,

where, at page 493, the court said, with reference to this Sec. 651:

"This statute is broad and general in its terms; so much so that the legislature deemed it necessary to add the proviso saving the concurrent jurisdiction of circuit courts."

In re Andrews, 92 Mich., 449,

the court, at page 452, said:

"Under our statute, probate courts have jurisdiction not only as to all matters relating to the settlement of estates of deceased persons, but as to the estates of minors and all others under guardianship. That jurisdiction embraces not only the appointment of guardians and the control over their official conduct, but the care and protection of the estate of the wards. Indeed, the grant of jurisdiction to probate courts is so general and extensive under our statute that to the section conferring jurisdiction the legislature added a proviso that such grant should not be construed to deprive circuit courts in chancery of concurrent jurisdiction. . . ."

"Probate courts, with us, occupy the same relation to persons under guardianship as did courts of chancery under the English system. They stand *in loco parentis*, in the place formerly occupied by the king, then by the chancellor, then by the court of chancery."

It can not be doubted that it was the intention of the Michigan legislature, no less than of the New York legislature,

"to provide an inexpensive and summary process for the settlement and adjustment of the accounts of guardians [executors] and to supersede the necessity of a resort to the court of chancery for that purpose."

The features of lien and execution seem immaterial in this connection. It does not appear that the executor, Ferry, had any property in Michigan which could be subjected to a lien or reached by execution.

But as to the powers of a Michigan probate court to issue warrants and process to carry into effect any of its orders or decrees, see Sec. 653, p. 44, *supra*.

It will be noted that the broad, equitable jurisdiction conferred upon probate courts by Sec. 651, p. 42, *supra*, is, in terms, "of all matter relating to the settlement of the *estates* of such deceased persons." It is not confined to the settlement of accounts. No estate can properly be "settled" without delivery or payment to each of his due.

An instance where such payment was directed is found in

Loomis v. Armstrong, 49 Mich., 521,

where the Court referred as follows to a probate court decree:

"Loomis, as heir at law of his deceased father, Henry Loomis, took measures to compel an accounting from Armstrong, the administrator, and in the probate court for Newaygo, a finding was made of a *balance*

due from the administrator of \$1,454.81, which he was ordered to pay over to the widow and heir equally."

The court discusses fully the practice in regard to the rendering and settlement of accounts, and finds no fault with the direction to pay contained in the probate decree.

So also in other jurisdictions, "accounting" includes paying whatever is determined by that accounting to be payable.

In *State v. Williams*, 77 Mo., 463,

the Court, at page 471, said :

"The learned counsel for appellants suggest that when the guardian charged himself with the ward's money obtained in Tennessee in his annual settlements that was a compliance with the conditions of the bond. The breach assigned in the petition being a failure, etc., 'to account for' this money. This is not all that is embraced in this term 'account for.' It is a condition not satisfied short of paying over the trust fund to the *cestui que trust*. *State ex rel v. Coleman*, 73 Mo., 684; *State ex rel v. Steele*, 21 Ind., 207."

In *Mitchell v. Moore*, 95 U. S., 587, 591,

Mr. Chief Justice Waite said :

"There is no specific prayer for the appointment of a new trustee or the payment of the principal of the fund to him when appointed; but such relief is necessary in order to carry into full effect an order for the removal of the old trustees."

In *Stevens v. Kirby, supra*, 156 Mich., 526,

counsel for Ferry had insisted that it was the duty of the probate court to render, in the first instance, a decree declaring simply the obligation of Ferry to account, and to so frame that decree as to make it final and appealable.

Counsel for the petitioners had contended that this would have been an unnecessary splitting of a cause of action into two parts, resulting in multiplication of appeals. Our contention was that it was proper practice in the probate court to try and dispose of the whole matter upon the merits, and that the final decree should not merely determine the obligation of the executor to account, but that it should also state that account and determine how much was owing by him. In *Stevens v. Kirby*, the Michigan Supreme Court upheld this view, which is tantamount to saying that the probate court had full jurisdiction to render such money decree.

Upon this point we cited, upon the argument, the following cases:

Eckfeldt's Appeal, 13 Pa. St., 171;
French v. Winsor, 24 Vt., 402;
Wilcox v. Wilcox, 63 Vt., 137;
 Palethorp's Appeal, 160 Pa. St., 315;
 Matter of Callahan, 139 N. Y., 51;
 Matter of Estate of Catherine Latz, 110 N. Y., 661;
Sequin's Appeal, 103 Pa. St., 139;
 Succession of Veronique Carriere, 34 La. Ann., 1056;
State ex rel Farmer v. Judge Parish Court of Ouachita, 31 *id.*, 116.

Unless this practice were followed, it results, as stated by Chief Justice Gibson in Eckfeldt's Appeal, that a suit in the orphans' court would be the business of a lifetime. There is no question as to what has been the practice in the trial courts of Michigan in this regard. In the first instance, the accounting suit is tried in probate court and judgment entered for or against the executor, according as the balance upon the accounting may be owing to or by him. Appeal is then allowed to the circuit court, and there the trial takes place *de novo* upon the merits. If the appeal is taken by the executor, the amount of his bond on such appeal is prescribed by Section 670, as amended by No. 92, Public Acts

of Michigan, 1901, (p. 68 *infra*). The issues are then framed under the direction of the circuit court. Upon a disputed executor's account, it is quite common to there try the issues of fact before a jury, and then the judgment of the circuit court is certified to the probate court in order that it may be duly carried into execution. A writ of error lies from the supreme court to the circuit court to review the final action of the circuit court.

It would seem perfectly clear that the decisions of the federal courts below are due to the failure of those courts to understand the system of probate law existing in Michigan, they apparently being familiar with other and different systems under which much less power is vested in courts of probate.

And since in the case at bar, as the Circuit Court of Appeals holds, there was jurisdiction to remove the executor, then as is said in

Mitchell v. Moore, supra, 95 U. S., 587,

there was also jurisdiction to enforce the payment of the sum due from that executor.

In May v. May, 167 U. S., 310,

Mr. Justice Gray said :

"The direction in the decree that he should surrender possession and control of the trust property and all the leases and papers in his hands and all moneys, whether derived from the collection of rents or otherwise, was a necessary incident of his removal and the appointment of a new trustee in his stead."

See also

Salomon v. People, 89 Ill. App., 374;
Salomon v. People, 191 Ill., 290 (1901).

Since, as the Circuit Court of Appeals concedes, the probate court has power to direct the executor to account, and to remove him, it must of necessity, in view of the foregoing decisions, have power to direct that he liquidate and pay.

In *Hanifan v. Needles*, 108 Ill., 403,

cited in the opinion of the Circuit Court of Appeals, the executor was given notice "to present his accounts of said estate for settlement as said executor," and the court found that such notice did not give the court jurisdiction to consider the question of his removal. But it does not follow that the Hanifan case is authority for the proposition that if an executor is cited into court to be removed, he cannot be made to account.

Wilson v. Hartford, 164 Fed., 817,

and cases there cited, which were also cited in the opinion below, are neither similar to nor precedent for the case at bar. They do not involve the calling of an executor to account.

E. THE LOSS BY REASON OF WASTE OR MALADMINISTRATION WAS PROPERLY CHARGEABLE AGAINST THE EXECUTOR IN HIS ACCOUNT; THE CHARGE FOR SUCH LOSS, MADE IN THE STATUTORY ACCOUNTING PROCEEDING DID NOT BECOME A CHALLENGED CAUSE OF ACTION *IN PERSONAM* AT COMMON LAW, TO-WIT: FOR *DEVASTAVIT*, OF WHICH THE PROBATE COURT WAS WITHOUT JURISDICTION; AND THE DECREE WAS PROPERLY RENDERED AGAINST THE EXECUTOR INDIVIDUALLY.

In *Loomis v. Armstrong*, 49 Mich., 521 (*supra*), the Court, at page 526, says:

"The object of obtaining and closing an administrator's account is to place on record an exact showing

of the assets which he has had, and of their disposal and of the resulting balance. And among the charges must be included such amounts, if any, as the estate has lost through his misconduct or default."

In *Campau v. Campau*, 19 Mich., 115.

the Court, speaking of the statute Sec. 9435 (*supra*, p. 41), says, at page 125:

"And by Section 2984, Compiled Laws [now Sec. 9435], if he should neglect or unreasonably delay to apply for license to sell the real estate in a proper case, he would become personally liable for all loss"

Section 670, as amended by No. 92 Public Acts of Michigan, 1901, is irresistible as to the personal liability of the executor for the amount found due from him upon examination of his account.

" . . . And in case any person appeals from the allowance and findings of the court upon the examination of his account as executor, administrator, guardian or trustee, the court may, in its discretion, fix the penalty of the bond in such sum as will cover the amount found due by the probate court upon examination of such account, in which case the bond and sureties thereon shall be liable to the amount of such bond for the amount found due by the probate court or the appellate court upon the final determination of such appeal, including the costs and damages awarded by such appellate court."

If a personal judgment were not rendered against the executor by the probate court at the time of the settlement of his accounts, what could be the meaning of this statute?

This statute was construed, and applied to the very probate decree now sued on, by the Michigan Supreme Court in

Stevens v. Kirby (*supra*), 156 Mich., 526.

The decree was before that court "covering 10 pages of the printed record," but the testimony on which it was based, and the account as stated by the accountant for the petitioners, were not before that court, which said:

"The merits of the accounting are therefore not before us."

It appears from the statement and the opinion, both prepared by Grant, P. J., that Edward P. Ferry noticed an appeal from the probate court decree and tendered an appeal bond of \$10,000. The probate judge required him to give a bond of \$860,000,

"being about the amount that would under the order be due to the petitioners. The respondent being a legatee his share was deducted from the amount of the bond."

Ferry then sought mandamus from the circuit court to compel acceptance of his tendered bond, and, this being denied, carried the matter to the Supreme Court by certiorari.

That court took the view that Ferry had used estate assets in payment of debts of his brother Thomas, as well as his own, and directed the probate court to reduce the bond to about \$600,000.

This view was, of course, not based on evidence, and we have no occasion to here discuss it, but the significant fact is that the highest court of Michigan, although reducing the bond, still held it at a figure which is only reconcilable with a personal liability of E. P. Ferry to the estate for the benefit of the other legatees under the probate court decree.

In other words the Michigan Supreme Court recognized the power and jurisdiction of the probate court, in proper case, upon examination of the account of an executor, to determine by a decree the amount due from him and to direct its payment. It did not decide whether this particular decree

was warranted by the evidence supporting it, because that was not before the court, but it did in effect and necessarily decide that the probate court had jurisdiction, if the facts warranted it, to render such a decree. Otherwise it would have held that such a decree, being beyond the probate court jurisdiction as fixing a personal liability of Ferry for the amount due the estate, was to that extent void, and that the tendered bond of \$10,000 was sufficient, as it certainly was if no personal liability on his part were involved.

It is not thinkable that the Michigan Supreme Court would have sustained a bond higher than \$10,000, if the probate court jurisdiction went no further than (Trans., p. 34)

"to adjudicate whether or not he should be removed as executor, whether or not he should account for the unadministered assets of his father's estate, the true state of that account, and whether or not the Trust Company should be appointed administrator *de bonis non*,"

read in connection with Judge Sanborn's common law construction of the word "unadministered," (Trans., p. 36)

"all property of the deceased which does not remain in specie is administered and not unadministered property."

The contents of the first printed volume of the record before the Michigan Supreme Court are indicated in the opinion and include the pleadings "and the orders of the probate court during the progress of the proceedings," to some of which we have called attention in this brief on pp. 54-5, as providing for adequate notice to the executor.

Moreover it is to be noted that the Michigan counsel for Ferry appearing in the Michigan Supreme Court did not claim that the probate court lacked jurisdiction to determine by decree his personal liability for the amount found due upon examination of his account or to direct payment to his

successor. Their contentions against jurisdiction were, as stated by the Supreme Court:

"(1) That the probate court did not possess the power to require such a bond mainly because there had been no such 'examination of account rendered' by the executor as the statute contemplates. That he had appeared only by guardian *ad litem* and next friend and protested against any liability to account.

"(2) That the requirement of such a bond was an abuse of discretion. . . . (e) That the question of jurisdiction or power of the court to make any such order (that of Dec. 31, 1907) is so doubtful that it is an abuse of discretion to require a prohibitory bond before permitting a review."

And even these contentions were not sustained by the court. It is thus apparent that the law and usage of Michigan, as known to this Michigan court and these Michigan counsel, were not such as declared by the learned judge of the circuit court of appeals, when he says (Trans., p. 41):

" . . . because the proceeding in that court was *in rem* and the adjudication of this personal claim for debt or damages was beyond the scope of the jurisdiction of that court in that proceeding, and because that court was without power to adjudge in that proceeding that the Trust Company as administrator *de bonis non* or personally should recover that debt or those damages, the order and decree of that court that the defendant was individually liable for and should pay to the Michigan Trust Company, administrator *de bonis non* of the estate of William M. Ferry, *on account of the devastavit* found \$915,355.08 was beyond its jurisdiction and void." . . .

The recurrence in the opinion below of reference to the personal liability as being for *devastavit*, prompts the reminder that, as clearly noted by the Michigan Supreme Court:

"The order of the probate court does not state the amount of the estate found to be in his hands *and which* it is charged he misappropriated and converted to his own use." [The italics are ours.]

If this conversion be indeed "a challenged cause of action *in personam*," is it not remarkable that the decree nowhere, by finding or adjudication, fixes the amount converted?

That decree ascertains the balance of account to be against the executor on examination of his account, adjudges him to be personally liable for that balance, allows him to retain his quarter share of it as a legatee, and directs him to pay the other three-quarters to his successor.

The conversion is merely *one* of the grounds of removal, one of the reasons for denying him compensation in addition to that allowed by the court when his two annual accounts were presented, and *one* of the reasons for computing interest at the legal rate and not compounded upon the annual balances in his hands, because the court can not in *all* cases determine just what profits he made from his investment of the funds of the estate. (Trans., p. 12.)

The decree finds (Trans., p. 11) that he had a balance on hand when his second annual report was made; that since that date large amounts, both of money and property, belonging to said estate had come to the hands of the executor from time to time down to and including 1900 [three years before the petition for accounting was filed], none of which has been accounted for, and that he converted and appropriated to his own use large amounts, both of money and property; but none of these amounts were specified in the decree. They constituted elements of an account then before the court which after examination and correction was approved, interest being allowed on both debits and credits at the same rate, with a resulting balance against the executor, on which the adjudication is based.

The charging surcharging and falsifying by petitioners of the two annual accounts filed, and of the powers of attorney, authorizations and other papers which the executor claimed should be treated as his final account, the requirement that he file a more detailed statement of money and property received and applied by him, the preparation and submission by petitioners of an account for him upon his refusal, the correction and ultimate approval of that account, the finding of the balance due against him and the direction that he pay to his successor, were all germane to an accounting and foreign to any form of action for debt or damages.

Cheever v. Ellis, 134 Mich., 645, 648-649.

is also an authority in support of the right of the probate court to render a personal decree against Edward P. Ferry. There an accounting by an executor was pending in probate court. The question involved was, how much, if anything, should be charged against the executor for waste in that losses had come to the estate through an agent and that such losses were due to the negligence of the executor. The executor died and his administrator filed a bill in chancery, thus transferring litigation from the probate to the circuit court. On page 649, Chief Justice Hooker said:

"At the time this bill was filed, the final account of the executor had been filed, and the parties were engaged in taking proofs relating thereto in probate court; the same having been interrupted by the death of the executor, Gruner. Both parties seem to have been willing to transfer this accounting to the court of chancery, and, while we doubt whether this was a competent practice, if objected seasonably, the face of the bill probably shows jurisdiction; and, as it has not been questioned, we dispose of the case upon its merits."

The plain meaning of this language is that the probate

court has full jurisdiction upon the executor's accounting to render a decree against him for losses through waste, and that the power of the probate court in that behalf is so ample that it may properly be construed to be exclusive in a proceeding there pending, and remedy in chancery denied upon objection seasonably taken.

As to that part of the opinion of the Circuit Court of Appeals relating to the inclusion of interest in the decree, we must again refer to and rely on as directly in point:

Stevens *v.* Kirby, *supra*, 156 Mich., 526;
Hall *v.* Grovier, *supra*, 25 Mich., 428.

Here are decisions and a statute of Michigan which abundantly substantiate the propositions set forth in this sub-head (E), and they are in direct conflict with the opinion of the court below as to what is the law of Michigan.

The proceeding in the probate court of Michigan was not an action in *devastavit*, nor even one in the nature of *devastavit*, but an application by the residuary legatees for an accounting in the pending and undetermined proceeding entitled, "In the matter of the Estate of William M. Ferry, Deceased." Their petition and notice could not have been predicated upon even an alleged *devastavit*, for until the account was rendered, they could not tell whether waste had been committed, nor did they seek to collect damages therefor. They merely sought what the law of Michigan charged Ferry with having in his possession as executor.

The probate court had jurisdiction of the accounting. If Ferry, on the accounting, had satisfactorily accounted for every asset which had come to his hands, there could have been no balance struck against him, no decree that he was indebted to the estate in the amount of that balance, and no decree that he pay the balance and thus liquidate his account. If Ferry, on the accounting, had shown improvident expenditure or investment of estate funds, or failure to collect

assets or income which he might have collected, whereby those interested in the estate had suffered loss, even though there had been no conversion to his own use, balance for the amount of such loss incurred through his fault would have been struck against him in accordance with the statutory provisions, and the decree would have charged him with that balance as a debt to the estate, directing him personally to pay it. Such jurisdiction is not denied by the Circuit Court of Appeals. That the taking of an account is within the equitable, as well as the statutory, jurisdiction of the probate court is plain upon the authority of

Gott v. Culp, 45 Mich., 265, 275.

It developed in the course of the taking of this account that there was a balance against the executor because of the misappropriation and conversion of assets to his own use. Did the probate court, through the development of that fact, lose its jurisdiction and power to do as in the supposition case, that is, to charge him with the balance of loss resulting from that misappropriation and conversion, decree that he was indebted in that amount to the estate, and direct the payment as a necessary part of the liquidation and settlement of the account? We are aware of no principle and no authority which ousts the jurisdiction of a probate court of an accounting as soon as the fact of misappropriation and conversion develops in the course of that accounting.

In *McLean v. Speed*, 52 Mich., 257, 259,

the court said (as already cited on p. 56) :

"It is a familiar principle, that when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of"

And also in

The Matter of Axell, 95 Mich., 244; and
Gott v. Culp, *supra*, 45 Mich., 265, 275.

Woerner, in his work on the American Law of Administration, at Section 534, says:

"At common law, *devastavit*, or *devastaverunt*, is the name of a writ given to any person who has been injured in his rights in consequence of the misapplication or waste of the assets or property of an estate by one or more executors or administrators, whereby he or they have made themselves liable to answer for the damages out of their own estate. Remembering the simple and efficient method pointed out by statute in the several American States for calling executors and administrators to account, in the probate court, for all property or assets of an estate which came into their hands, or which, by the exercise of reasonable prudence and diligence, might have been recovered by them, it becomes obvious that no necessity exists in America for a remedy of this kind. The accountability of executors and administrators to the probate court or in equity, as provided by statute, covers the whole ground. Under the American system, even the technical return of *devastavit* by a sheriff to an execution against a defendant executor or administrator is without application,—the decree of the probate or chancery court upon an accounting more effectually taking its place. As it rests upon an ascertained amount of assets,—either of property in kind, or of a balance in money, which is or ought to be in his hands,—the liability is necessarily a personal one, recoverable *de bonis propriis*, and binding upon his sureties. There is no occasion, therefore, to dwell upon the doctrine of *devastavit*; it has no application here, save that the name is still employed by judges and lawyers to designate the circumstances under which an executor or administrator is held personally liable for acts of negligence or conversion."

It is said by the Court of Appeals that this was a proceeding *in rem*, and therefore no personal claim could be made. Any person who has held the property of others in a fiduciary capacity, when called to account in the proper court, is there as an individual to respond in person for his dealings with what has been entrusted to him, whether as executor, administrator, guardian, trustee, receiver, assignee for benefit of creditors, custodian of public moneys, or otherwise.

On the other hand, the claim of an outsider, as, for example, of a creditor, is in a sense *in rem*, since under the systems of law obtaining in this country his recovery will be limited by the amount of the *res* available for payment of debts.

But even in such a case, this Court has expressed indecision as to whether a creditor's claim should be regarded as *in personam* or *in rem*.

Johnson *v.* Powers, 139 U. S., 156.

There is good sense as well as sound learning in the following statement of the matter by Prof. James Schouler:

"Probate allowances in favor of creditors or third persons are directed, not against the executor or administrator personally or his property, but against the assets of the estate in his hands. The matter of inquiry lies between the creditor or third person and the estate, and the executor or administrator has no personal interest or responsibility concerning it; but when it comes to a final settlement, the whole contest, if any, is between the estate and the executor or administrator, and the result of the contest, if adverse to him, charges him personally and the judgment therefore should run not against the estate but against him."

18 Cyc., 1187.

As to the power of the probate court to direct payment, the following sections of the Michigan statutes are pertinent:

Sec. 9408. "Whenever a decree shall have been made by the probate court for the distribution of the assets among the creditors, the executor or administrator, after the time of payment shall arrive, *shall be personally liable to the creditors for their debts or the dividend thereon, as for his own debt*; or he shall be liable on his bond, and the same may be put in suit on the application of a creditor, whose debt or dividend shall not be paid, as above mentioned."

In *Basom v. Taylor*, 39 Mich., 682,

Mr. Justice Marston, rendering the decision of the Court, says (p. 686) :

"The statute speaks of and treats the action as one to be brought against them officially; it is to reach assets of the estate in their hands. The judgment to be recovered cannot exceed the amount of the assets as decreed by the probate court, and that court having made a decree for the distribution of the assets, it is binding upon the executor. It *thereupon becomes his duty as such executor to pay over the amount thereof, and failing so to do, he is, by the statute, declared to be personally liable therefor, as for his own debt*. This personal liability, however, does not sever and disconnect the claim from being one in fact against the estate. If a judgment is recovered and paid, it is charged as against the assets in his hands, and is so treated in the final settlement; otherwise the recovery and payment of judgments under this section, no matter to what amount, would not tend to diminish the assets, and still leave him liable, through the probate court, to account therefor."

And again, on page 687 :

" . . . and after the decree of the probate court ordering payment, I can see no good reason why suit might not be brought in justice's court, or an action of garnishee be commenced, were it not for the statute which takes from the justice his jurisdiction in such cases."

In re Palms' Appeal, 44 Mich., 637,

arose under the above statute, and it was held that, by force of the statute, the demand in question became a personal charge against the administrator and that he became liable for it as for his own debt. It was held that the debt was a valid claim against the estate of the administrator after his decease.

The probate court of Ottawa County, in its decree of Dec. 31, 1907, finds that the debts, funeral charges and expenses of administration have been paid, and directs Ferry to retain one-fourth of the amount due the estate as his distributive share and directs payment of the residue of the estate to the Michigan Trust Company, appointed administrator *de bonis non*, as the person by law entitled to the same. This must be done in order that the estate may be finally closed by someone competent to perform that function, else how could estates ever be closed? Moreover, it must be done under the following statutory provisions:

Sec. 9443. "After the payment of the debts, funeral charges and expenses of administration, and after the allowances made for the expense of the maintenance of the family of the deceased and for the support of the children under seven years of age, and after the assignment to the widow of her share in the personal estate, or when sufficient effects shall be reserved in the hands of the executor or administrator for the above purposes, the probate court shall, by a decree for that purpose, assign the residue of the estate, if any, to such persons as are by law entitled to the same, subject, how-

ever, to the widow's right of dower, if there be a widow of the deceased entitled to dower, and her dower shall not have been assigned and set off to her."

Sec. 9444 as amended by Public Act No. 177, Laws 1903: "In such decree the court shall name the persons and the proportions or parts to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any other person having the same or any part thereof, after the expiration of 60 days from date of such decree, unless an appeal shall have been taken therefrom, in which case they shall have the same right immediately upon the final determination of such appeal."

In *Clark v. Fredenburg*, 43 Mich., 263, 264,

it appeared that the probate court had passed on the executor's account and decreed that after payment of all debts, claims and administration charges,

" . . . there then was in the hands of the said executor, or for which he was liable to said estate, of the assets and credits thereof, the sum of \$10,440.70 in money, and that \$4,000 thereof was"

bequeathed to the testator's widow.

It further appeared that the executor refused to pay this legacy and was insolvent, in consequence of which the probate court granted leave to the widow to sue the surety.

Chief Justice Marston said:

"No appeal has been taken from the order and decree of the probate court. . . . The decree . . . establishes the fact that the executor had received sufficient funds over and above all claims and charges against the estate to pay complainant's legacy in full . . .

"That the probate court had jurisdiction in the prem-

ises there can be no question, and the decree so made is binding upon the executor, the complainant and all parties in interest. If dissatisfied therewith they had a remedy, but not having pursued this the decree is conclusive and cannot be attacked collaterally. Under this decree it became the clear duty of the executor to pay over to the complainant her legacy, with the interest due thereon”

Pierce *v.* Holzer, 65 Mich., 263,

was an action by a surety on an administratrix's bond to subject real estate purchased by the administratrix with estate funds to payment of claims paid by the surety. In the opinion, Champlin, J., reviewing the proceedings below, says, p. 266:

“After making all allowances, the judge of probate found that she had in her hands belonging to the estate, subject to distribution among creditors, the sum of \$755.71. He also found that the unpaid indebtedness amounted to \$2,082.75, and that she should pay to each creditor 36.28 per cent. of his claim; and thereupon, on the 30th day of December, 1876, made an order that the \$755.71 should be distributed to the creditors within sixty days from that date.”

And again, on page 269:

“No fault is found with this account, and no fraud, omission, error, or concealment is charged in the bill of complaint against it. The amount found by the judge to have been in her hands must stand as the true amount due from her to the estate.”

Judgment was awarded against the administratrix personally and in favor of the surety.

See also

Loomis *v.* Armstrong, *supra*, 49 Mich., 521.

F. THE BALANCE, WHEN FOUND AGAINST THE EXECUTOR, IS PROPERLY PAYABLE TO THE ADMINISTRATOR *DE BONIS NON* WITH THE WILL ANNEXED APPOINTED IN HIS PLACE, AND THE DECREE PROPERLY DIRECTED SUCH PAYMENT. ACTION ON THE EXECUTOR'S BOND IS NOT THE ONLY WAY IN WHICH THE PROBATE COURT MAY EVER ACQUIRE ANY JURISDICTION WHATEVER OVER CLAIMS AGAINST THE EXECUTOR BECAUSE OF HIS NEGLECT OR MALADMINISTRATION.

A DECREE DIRECTING PAYMENT TO THE ADMINISTRATOR *DE BONIS NON* IS PROPER, ESPECIALLY WHEN ALL CLAIMANTS CONSENT THERETO.

In directing that the net balance found due from the executor be paid to the Michigan Trust Company as administrator *de bonis non*, the decree was in strict accord with the practice and procedure in Michigan. As has been stated, the Michigan probate statutes were taken from the statute books of Massachusetts.

In the year 1838, Chapter 98, of the General Statutes of Massachusetts, entitled "Of the Accounts and Settlements of Executors and Administrators" was made Chapter 5 of the Revised Statutes of Michigan, entitled "Of Executors and Administrators Rendering Their Accounts and Settling Estates." With those statutes came as necessarily incident thereto the decisions of Massachusetts construing those statutes. It was so held in

Campau v. Gillett, supra, 1 Mich., 416.

In the year 1810, Chapter 98 of the General Statutes of Massachusetts was in effect, and it was then that

Storer v. Storer, 6 Mass., 390, 392,

was decided. On that case the Michigan probate court relied in making its decree of December 31, 1907, directing

that payment be made to the Michigan Trust Company as administrator *de bonis non*.

In that case, Joseph died before completing administration of John's estate. Joseph had given administration bond to the judge of probate. Defendants, his administrators, settled Joseph's account as administrator in the probate court, showing a balance of \$627.14 due from Joseph to John's estate, and the probate court decree directed defendants to pay that balance to plaintiff, the administrator *de bonis non* of John. The balance was not paid, and the administration bond given by Joseph was put in suit against his administrators, the now defendants, for the benefit of plaintiff as administrator *de bonis non* of John, judgment was rendered in favor of the judge of probate as such, but no execution issued.

Then plaintiff, as administrator *de bonis non*, brought the present action of debt against Joseph's administrators, declaring on the probate court decree as on a judgment.

Defendants contended

"that no action lies on a decree of the judge of probate, the law having furnished another and better remedy by an action on the administration bond."

Parsons, C. J., in delivering the opinion of the court, said :

" . . . This action is maintainable by the plaintiff. When the decree passed he might have sued this action, if the defendant refused to obey the decree

"The judgment upon the administration bond is no bar to this action, being merely a cumulative remedy, although there may be two remedies, there can be but one satisfaction. . . . There are cases in which an action on the bond may be the most effectual remedy. . . .

"After this opinion was given, the Court inquired why execution was not awarded in the suit upon the bond; and it was said that, as the sum decreed was to

be distributed when recovered, and as the defendants were entitled to a distributive share, execution was suspended until their proportion might be settled, and deducted from the amount of the decree in a new account.

"The Court then observed that there must have been some mistake or misapprehension; for the present plaintiff ought not to settle another administration account, charging himself with this balance, before he received it; and that the only *regular way in which a distribution could be decreed, was the payment of this balance to the plaintiff, and then a distribution of it, upon his charging himself with it in a new account.* But if the parties would agree, it might now be done by the entry of a special judgment."

A special judgment was thereupon entered.

The effect of this decision is that to decree payment by the executor to the administrator *de bonis non* is the "only regular way." It is on all fours with the procedure followed in the case at bar.

In *Wiggin v. Swett*, 6 Metcalf, 194,

the question raised was whether an administrator *de bonis non* is the aggrieved party and therefore entitled to appeal, and Chief Justice Shaw, at page 198, said:

"When, therefore, a sole executor dies, and an administrator *de bonis non* is appointed, the latter is the rightful administrator. The balance in the hands of a former administrator, *even when obtained by suit on the bond, is to be paid into the hands of the administrator de bonis non*, and shall be assets: *A fortiori*, when such balance is obtained without suit. Such an administrator has a direct interest in increasing such balance. So if the balance is in favor of the former administrator, and there is real estate, liable to be sold on license, by the administrator *de bonis non*, to pay such balance, he has a direct interest, as trustee for the legatees, to

diminish such balance. In other words, he becomes the sole representative of the estate, *the trustee for all persons having an interest in it*; and, as such, it is his province and duty to see that the account is settled correctly; he is aggrieved in his property if there be any failure to account for all that is due to the estate, and therefore may appeal."

This decision was made in reliance upon the Massachusetts statute, being Sec. 29 of Chap. 101, appearing in G. S. Mass. of the year 1860, and there reading:

"All money received on such execution (unless it is awarded for the use of a creditor or person next of kin as provided in the first and second subdivisions of the preceding section) shall be paid to the co-executor or co-administrator, if there is any, or to whomsoever is then the rightful executor or administrator, and shall be assets in his hands, to be administered according to law."

Michigan was admitted to the Union in 1837 and, in 1838, enacted its Revised Statutes in which the section above quoted from the Massachusetts law appeared almost verbatim as Sec. 11, Chap. 7, Title IV. It was subsequently changed in phraseology, but not in substance, by the revision of 1846, to read as follows in Comp. Laws Mich., 1897:

Sec. 9496. *"All moneys received on any execution issued on a judgment in favor of the judge of probate, as mentioned in the preceding section, shall be paid over to the co-executor or co-administrator, if there be any, or to such person, other than the defendant therein, as shall then be the rightful executor or administrator, and such moneys shall be assets in his hands to be administered according to law."*

The close following by Michigan of the Massachusetts text is illustrated by the retention therein, even after the 1846 revision, of the words above italicized, and it will be

noted that it is in comment on these words that Chief Justice Shaw observes, in *Wiggin v. Swett* (*supra*), that the administrator *de bonis non*, appointed on death of a sole executor, is the "rightful administrator," that the balance in the hands of a former administrator "is to be paid into the hands of the administrator *de bonis non* and shall be assets," that this is true "even when obtained by suit on the bond" and "a fortiori, when such balance is obtained without suit."

This Massachusetts construction must be followed as the law in Michigan. It declares the effect which by law and usage is given in Michigan to the probate decree sued on below, and thus comes within the full faith and credit doctrine as declared by Chief Justice Waite (*supra*) in

Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S., 615.

In Buttrick, Admr., v. King, Admr., 7 Metc., 23.

Chief Justice Shaw says:

"The administrator *de bonis non* of the husband is the proper person, we think, to take and administer the fund, because, if there should still be debts due from the testator, as there may be, notwithstanding the lapse of time, on covenants real, or the like, the creditors would be entitled to payment before the legatees. Otherwise, the administrator *de bonis non* will be bound to pay over to the legatees, according to the will."

To the same effect is

Sewall v. Patch, 132 Mass., 326.

where the court, commenting on *Buttrick v. King*, *supra*, states:

"This decision has been referred to and cited by the

court repeatedly and no doubt has been expressed as to its soundness. . . . ”

In *Minot v. Norcross*, 143 Mass., 326,

Healy was appointed executor of Percival's estate and died many years afterward, not having rendered any account to the probate court, and his estate was insolvent. The administrator *de bonis non* of Percival was permitted to prove the claim for the proceeds of real estate sold by Healy before commissioners appointed on the insolvent estate of Healy. The court said:

“If Healy had commenced the execution of the will, had sold real estate under the authority given, and with the proceeds in his possession had then resigned his office, or been removed therefrom, it could not have been necessary to appoint an administrator *de bonis non* to receive the personal property not administered, and also a trustee to receive the proceeds of the real estate. The whole of it—that which was originally personal, and that which had been lawfully converted from realty to personalty by the authority of the will—was of the goods and estate not already administered.”

In *Barlow v. Nelson*, 157 Mass., 395,

an action was brought by a residuary legatee because of the conversion by the executor of money and property of the testator. The court, by Lathrop, J., said:

“There is another difficulty in the plaintiffs' case. The action should have been brought by the administrator *de bonis non*, with the will annexed, of the estate of the testator. *Lawrence v. Wright*, 23 Pick., 128; *Buttrick v. King*, 7 Metc. (Mass.), 20; *Varnum v. Meserve*, 8 Allen, 158; *Sewall v. Patch*, 132 Mass., 326; *Minot v. Norcross*, 143 Mass., 326.”

In *Tallon v. Tallon*, 156 Mass., 313,

action was brought by the legatee against the administratrix of an executor, and the court, by Chief Justice Field, said:

"But, as the administrator of the deceased executor is not charged with the administration of the first testator's estate, an action cannot be brought by a legatee for a legacy against him, even if he is liable as administrator of the executor to the administrator *de bonis non* of the testator for the property of the testator's estate which the executor has not accounted for, or has wasted or converted to his use."

In *Brown v. Doolittle*, 151 Mass., 595, the court, by Justice Allen, said:

"As regards creditors, the decree allowing the account was not a settlement of the administration of the estate, and the administrator remained liable to account for the whole amount of the inventory as assets, and it was his duty to pay over the assets of the estate to the administrator *de bonis non*, whose duty it was to collect them. *Wiggin v. Swett*, 6 Metc., 194; *Cobb v. Muzzey*, 13 Gray, 57; *Choate v. Thorndyke*, 138 Mass., 371. The appointment of the administrator *de bonis non*, to administer the assets which had nominally been accounted for, involves the invalidity of that account and settlement, and the necessity of a further accounting by the original administrator. If the whole estate is paid over, it will be held to pay expenses of administration, and the debt of Pennell, if it is established, and the balance to be distributed. The decree of the probate court ordered that the account should be opened, the credits disallowed, and that the \$9,000 and interest thereon be paid over to the new administrator. The opening and disallowance of the account would leave the original administrator liable to pay over the \$9,000, and make him and his sureties liable on his bond,"

The court then explains a method whereby it will not be necessary for the administrator to be ordered to pay over

the entire sum, inasmuch as a large part of it was properly distributed by him.

In *Fay v. Muzzey*, 79 Mass. (13 Gray), 53, at page 56, the court said:

"The chattels which were returned by the administratrix in her inventory must be accounted for by her. If it should appear that they had been delivered by her to her successor, the administrator *de bonis non*, that would discharge her from her liability. The fact that the chattels were in existence, and had not been sold by the administratrix, would make it proper for him to include them in his inventory. They belong to the estate, and remain to be administered, and the administrator *de bonis non* is entitled to receive them, *or to maintain a suit for their value against the administratrix.*"

Cobb v. Muzzey, 79 Mass. (13 Gray), 57,

was an appeal by an administrator *de bonis non* from a decree of a judge of probate allowing the account of Elizabeth Muzzey, administratrix, who had credited herself with cost of repairs made to a public house of deceased and had retained rents paid by lessee. The right of the administrator *de bonis non* to enforce collection of sums erroneously allowed in administratrix' account, seems to be conceded, and the court said (page 58) :

"The court are of the opinion that the appeal of the administrator *de bonis non* must be sustained. . . ."

In *Cranson v. Wilsey*, 71 Mich., 356,

Armena Wilsey and James F. Mead were appointed and qualified as executors of David G. Wilsey. The probate court ordered a division of the property without requiring its conversion into cash, and some twelve years later David

H. Rheubottom, one of the legatees under the will, petitioned the court for an account by the executor and for an order directing the filing of a new bond. The petition alleged, among other things, the insolvency of James F. Mead and a fraudulent disposition of Armena Wilsey's property. The executors were removed and one Eaton was appointed administrator with the will annexed and was granted leave to sue on the bond given by the former executors for their conversion of assets belonging to the estate. The court, at page 360, said:

"It is claimed, however, that this action was brought in the name and for the use of David Rheubottom, who has no definite interest. This is undoubtedly true, and the action should not have been for his use. But the leave was granted to the administrator, who is a proper party, and who is entitled to take the fund, and see that it is duly invested. Inasmuch as the judge of probate is the proper plaintiff, we see no reason why the record should not be so amended as to make it show the administrator as the party in interest, and it will be so done."

See *Croswell on Executors*, Sec. 180, where the author states:

"If a balance is found due from the former executor or administrator to the estate, the judge of probate will make an order that that amount be paid to the administrator *de bonis non*; and upon that decree the administrator may have an action of contract against the outgoing executor or administrator, or his representatives, or he may have an action on his administration bond, against him or them or his sureties. He is not limited by election of one of these remedies, and he may sue on the administration bond, and get judgment, and then sue on the decree of the court."

The cases cited by the Circuit Court of Appeals in this connection (*Beall v. New Mexico, and others*) are here

again distinguishable from the case at bar. For instance, in that case all the parties interested were not before the court and could not have acquiesced in the rendition of the decree, while in the case at bar *all* parties having an interest in the estate were before the court, all claimants (except the executor himself) acquiesced in the decree, hence the reason in that case assigned for holding the decree in favor of the administrator *de bonis non* irregular and void is obviated here. In the case at bar all the persons interested were in court and the decree is, therefore, if for no other reason, good. In this connection

Morris, Adm., *v.* Morris, Adm., 4 Grattan (Va.), 293,

is directly in point.

In that case an action was brought by Rice Morris, as administrator *de bonis non* of Samuel Morris, against Beverly Staples as administrator with the will annexed of Tandy Morris, the sureties of Staples and the distributees of Samuel Morris (Tandy Morris having been in his lifetime administrator of Samuel Morris), for an accounting by Tandy Morris, as administrator of Samuel Morris, and for a decree that Staples settle his own accounts and the accounts of Tandy Morris. There the court below decreed that the plaintiff, Rice Morris, as administrator *de bonis non* of Samuel Morris, should recover the sum of \$512.04, with interest, etc., against Staples, the administrator with the will annexed of Tandy Morris, and his sureties on his administration bond. The court, at page 343, said:

"So much of the decree as is in favor of the administrator *de bonis non* of Samuel Morris, deceased, is not objected to on the merits. Strictly, perhaps, it should have been in favor of the distributees, and not of the administrator, according to the cases cited in Wernick *v.* MacMurdo. The other distributees who

were parties do not complain, and as it clearly appears this debt was entitled to priority over all others, and there was a sufficiency of assets to discharge it, so much of the decree against Staples should be affirmed."

The court, at page 345, said :

"The court is further of opinion that there is no error in so much of said decree as ascertains the priority of the claim of Rice Morris as administrator *de bonis non* of Samuel Morris, deceased, to satisfaction out of the assets of Tandy Morris, deceased, and renders a decree in his favor for the amount ascertained to be due against said B. Staples, administrator with the will annexed of said Tandy Morris, deceased, and the securities of said Staples on his official bond; for, although said decree should in strictness have been rendered in favor of the distributees of said Samuel Morris, deceased, instead of his administrator *de bonis non*, yet *as said distributees were parties to the suit, and have not complained, and being parties, a payment of the decree to the administrator de bonis non would be a valid discharge to the administrator of Tandy Morris, the irregularity is one which cannot prejudice him, and therefore one of which he cannot complain.*"

In Lafferty *v.* Bank, 76 Mich., 35.

the court, after declaring, on page 50 :

"Under our statutes, the assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testator,"

further says, on page 51 :

"But they hold it [personal property] in their official capacity as executors, and if they die, resign, or are removed, the assets undisposed of by them fall back into the estate of the deceased, and may be sued for

and recovered by the administrator *de bonis non* with the will annexed."

This should also be read in connection with the decision by the same court in *Hall v. Grovier*, 25 Mich., 432, as to an asset belonging to the estate, but misappropriated by the administrator :

"In contemplation of law it was still in his hands."

The Circuit Court of Appeals, in its opinion, states that an action brought in another court on the probate bond in the name of the judge of probate affords the *only* way in which the probate court could ever acquire any jurisdiction whatever for assets converted or misappropriated, and the only way in which the administrator could acquire possession of the amounts so recovered.

The statutory provisions cited by the court below in support of that holding are found in a chapter confined to and entitled "Of Probate Bonds and the Prosecuting of Them." By these statutes the bonds run to the judge of probate, and action thereon must therefore be brought in his name. But anyone interested may obtain his certificate of leave to bring suit thereon against the sureties, and the amount so recovered from the sureties does not go to the party bringing the suit, but is turned over to the remaining or successive administrator and treated as assets in his hands. The amounts so recovered were never assets of the estate or proceeds of assets. They come from the sureties. Suit on a bond is unnecessary unless a suit is brought against sureties. The principal is liable, regardless of his bond and the sureties thereon. It may be well that the only way to *recover on the bond*, for delinquencies of the executor, is under this chapter, and thus *exclusio alterius*. But

Lafferty v. Bank, 76 Mich., at pages 49-50,

is authority that parties interested are not confined to the remedy of suit on the bond, which might prove futile because of death, insolvency or non-residence of the sureties, and expressly defines the meaning of the word "administered" as used in probate statutes, including Sections 9318 and 9332 (*supra*, p. 43), referred to in the opinion below.

In *Cole v. Shaw*, 134 Mich., 499,

the widow qualified as executrix and gave a residuary legatee's bond in \$5,000, conditioned *inter alia* to pay all legacies. There was a legacy of an annuity to her husband's sister. The probate court, on petition of the executrix, but without notice, discharged the executrix and cancelled the bond, which was delivered up and removed from the files.

The legacy had not been paid. A year later the legatee filed her petition in probate court praying that the residuary legatee furnish a new bond or that an administrator be appointed to take charge of the estate.

Sec. 9334 is as follows:

"When an administrator shall be removed, or his authority shall be extinguished, the remaining administrator, if any, may execute the trust; if there shall be no other, the court of probate may commit administration of the estate not already administered to some suitable person, as in case of the death of a sole administrator."

The court construing this section held that an administrator *de bonis non* should be appointed.

The query arises: what could this administrator *de bonis non* take with which to satisfy the legacy, if the doctrine as laid down in the ruling of the Circuit Court of Appeals in the case at bar is to prevail? He could take only the estate not already administered, and that estate had seemingly vested in the widow. There was no bond on which he could

bring suit in the name of the probate judge. The bond had been cancelled and delivered up. By necessary inference, the successor administrator had some means of getting from the widow enough to satisfy the sister's legacy, otherwise appointment of successor administrator would have been futile. This case is also interesting in that it cites with approval *Lafferty v. Bank*, 76 Mich., 35.

The proper practice in Michigan, as adopted from Massachusetts, is to bring the executor to account in the court of his appointment and there settle his account and adjudicate the amount due from him to the estate he represents. Thereafter, but not before, his successor can maintain an action at law against him for the balance due.

In *Tyler v. Wheeler*, 160 Mass., 206,

the court held in substance that an administrator *de bonis non* with the will annexed of an estate cannot maintain an action at law against an administrator of the estate of an executor of the will *in the absence of an account in the probate court* for assets which the executor *appropriated* and assumed to administer and which cannot be traced or identified as a part of testator's estate.

In *Amidown v. Kinsey*, 144 Mass., 587,

it was held that a bill in equity by the administrator *de bonis non* with the will annexed, alleging merely that the defendant as executor sold real estate under a power in the will and *misappropriated the proceeds* and refused to account for them, cannot be maintained as a bill for an account. Also held that the executor's account of these misappropriated assets must be settled in the probate court. Justice William Allen said :

"The statute requires that an executor's account of an estate in process of settlement in the probate court

shall be rendered only in that court, and this court has jurisdiction of it only as the supreme court of probate on appeal."

To like effect are

Cobb *v.* Kempton, 154 Mass., 266;
 (Citing Storer *v.* Storer, 6 Mass., 390;
 Drew *v.* Gordon, 13 Allen, 120-122.)
 Thorndyke *v.* Hinkley, 155 Mass., 263-265;
 Butterick *v.* King, 7 Metcalf, 20.

Such prior accounting in the court of appointment follows the rule laid down by this Court in the leading case of

Vaughan *v.* Northup, 15 Peters 1.

It may be here said that there are cases in which legatees have sued an executor in a court other than that of his appointment, or even in another state, but those are cases in which a legatee sought his specific legacy, or sought to trace trust funds. Here it is different. All the petitioners were *residuary* legatees and devisees. Until an accounting was made to the probate court how could they or any court decide what the residuum was and how much thereof each of the petitioners should receive? No court other than the probate court of Michigan can fix a residuum in an estate there pending.

If there had been any error or irregularity in the direction of the probate court decree that payment be made to the administrator *de bonis non* instead of to some or all of the petitioners, that error or irregularity could have been cured in the probate court on application of any party, or upon appeal to the circuit court. No such error or irregularity was even suggested in the course of the Michigan litigation, and both the Circuit Court of Ottawa County and the Supreme Court of Michigan in mandamus and certiorari proceedings taken by Ferry in respect of the bond on appeal

from that decree have incidentally recognized the decree as in accord with the Michigan practice and within the scope and jurisdiction of the probate court.

Stevens *v.* Kirby, *supra*, 156 Mich., 526.

Beall *v.* New Mexico, 16 Wall, 535, is cited by the Circuit Court of Appeals as authority for its ruling that property of the deceased which does not remain in specie is "administered" and not "unadministered" property; but we have not here to deal with a ruling relating to New Mexico estates when, as in Michigan, the statutes are clear and unmistakable in their comprehensive scope.

G. THE RENDITION OF THAT DECREE WAS NOT AN ATTEMPT TO DEPRIVE RESPONDENT OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The repeated references in the opinion of the court below to the probate decree as "charging" or rendering "liable" the property of the respondent beyond the jurisdiction of the probate court, and the statement (Trans., p. 38)

"the effect of the adjudication of the probate court of Michigan, if authorized, must be to deprive the defendant of property worth more than \$900,000 situated in the State of Utah, if he has that much there"

occurring in discussion of what constitutes due process of law to support the decree, call for the reminder that the probate court decree could not have and does not purport to have any such extra-territorial effect. It stated his account, it fixed a sum as due from him and it directed payment. If the process of the probate court sufficed for that, it was due process of law.

Collection of the debt thus judicially determined is another matter arising in another forum, that of the federal court

of Utah, and no process of law to support a judgment "charging" or rendering "liable" respondent's property in Utah could be put to the test except process of that federal court in Utah. As a valid Michigan judgment, the decree had no more effect to charge property of respondent in Utah, than would have his valid note made in Michigan. Each must be sued on in Utah, and only the resulting judgment and execution in Utah would charge his property there.

In the leading case of

Mills v. Duryee, 7 Cranch, 481 (*supra*, p. 12),

Mr. Justice Story said, at p. 485:

"Another objection is, that the act cannot have the effect contended for, because it does not enable the courts of another state to issue executions directly on the original judgment. This objection, if it were valid, would equally apply to every other court of the same state where the judgment was rendered. But it has no foundation. The right of a court to issue execution depends upon its own powers and organization. *Its judgments may be complete and perfect, and have full effect, independent of the right to issue execution.*"

"Due process of law" to support the probate court decree is not to be measured by the requirements in ordinary actions at law or suits in equity, or in such special proceedings as garnishment or "trustee process," so-called. *Fenton v. Garlick*, 8 Johns, 195-6, upon which stress is laid in the opinion of the court below (Trans., p. 40) is readily distinguishable from the case at bar. Seth Garlick was not an officer of the Vermont court, but, on garnishment out of that court, answered that he had made a note to Samuel Garlick, the judgment debtor. It does not appear that Seth disregarded that garnishment. If he paid the note at all, he may have paid it to some innocent purchaser for value before maturity. The facts are not disclosed. After his

removal to New York, the Vermont court, on a rule to show cause served upon him in New York, undertook to render judgment against him personally for the amount of the judgment debt of Samuel, with costs. This judgment, when sued on in New York, was held void.

It is difficult to see how this case can be deemed authority for anything bearing on the construction of the "full faith and credit" doctrine.

It was rendered by the Supreme Court of New York in 1811, when imprisonment for debt, and initiation of suit by arrest of the defendant, were still in current usage. That state, like other and neighboring states, gave grudging adherence to the full faith and credit clause of the constitution and the act of Congress of May 26, 1790, c. 11. It required the later decision of this court in *Mills v. Duryee* (*supra*), rendered in 1813, to lay down the true rule of construction. Prior to that, such judgments were held only *prima facie* evidence (see note "a" by the editor, William Johnson, to *Robinson v. Executors of Ward*, 8 Johns, 86, as appearing in the 3rd edition of his reports printed in 1839; also discussion in *Borden v. Fitch*, 15 Johns, 121, of the varying views held before the question was set at rest by *Mills v. Duryee*.)

The analogy which the New York court seeks to draw in *Fenton v. Garlick* (on p. 197) is with the case of a creditor's claim against an estate, which must be first established against the estate, before any basis is afforded for contention that the executor has wasted the estate. It has no pertinency in a case where, as here, the residuary legatees have called the executor to account in the court of his appointment, and on examination of his accounts it appears that there has been loss with which he is chargeable and for which he is individually liable.

In the case at bar Ferry was an executor and, as such, an officer of the probate court, subject to its general juris-

dition in all matter relating to the *settlement* of his father's estate.

That the rule as to the notice to executors or administrators is different from that in regard to notice to others, is illustrated by the following quotation from a well considered case:

Moore v. Fields, 42 Pa. St., 467, 473.

"The regular service of such process is of prime moment, for it is in virtue of that that the tribunal ordinarily gains jurisdiction; *but in the case of these defendants the surrogate had jurisdiction from the time he granted the letters of administration, and it was their legal duty to appear and settle their accounts without any summons whatever from the surrogate.* The fact that his notice reached them in Pennsylvania was not, in our judgment, a circumstance of any importance."

And that rule has been recognized as the law in this Court.

A case very much in point both on the question of due process of law and the full faith and credit that should be accorded by courts in sister states is

Fitzsimmons v. Johnson, 90 Tenn., 416.

There the testator died a resident of Ohio, his executors, residents of Tennessee, qualified in the Ohio probate court, and in 1865 made there an alleged final settlement and were discharged. Twenty-two years later, in 1887, one of the residuary legatees filed her petition in error in the Ohio court of common pleas for review and reversal of the probate court judgment. The surviving executor, absent from Ohio, was cited in by publication and mailing of notice under the Ohio statute. He defaulted, the probate court judgment was reversed and the cause remanded to the probate court. After remand other residuary legatees filed exceptions in the

probate court, and copies thereof with notice of hearing thereon was mailed to the surviving executor in Tennessee. He again failed to appear.

The Ohio probate court sustained the exceptions, adjudged that certain sums, *with interest*, aggregating \$130,640, remained, *or should be*, in the hands of the executors for distribution, and ordered the surviving executor to distribute said sum "according to the will . . . and according to law."

Suit was brought on this judgment in Tennessee, and taken for review to the Supreme Court of that State, which held that the Ohio probate court had jurisdiction of the subject matter, since by Ohio statute it had general jurisdiction to settle the accounts of executors and administrators, and to direct distribution of balance found in their hands; and also held that the probate court had jurisdiction of the person of the executor who, being properly before the appellate court by constructive notice, was chargeable with notice of the reversal, remand and subsequent proceedings in probate court, *without additional notice by publication or otherwise*, the court saying:

"In that way he had his day in court when the large judgment was pronounced against him, and he is bound by it the same as if he had been personally served with process."

And the Tennessee court further held (Syllabus):

"The record of the final settlement of an administrator, containing debits and credits in full, and an order to the administrator to distribute a balance found in his hands, according to the will and the law, is a 'judicial proceeding,' within Const. U. S., Art. IV., Sec. 1, which provides that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.'"

While in Ohio an execution might, after thirty days, be issued on the judgment (R. S., Sec. 6195), it does not appear from the record that such execution issued, for, as in the case at bar, issuance would have been futile.

But in the Ohio probate court the stage of final distribution had been reached, whereas in the Michigan probate court that distribution remains to be effected by the administrator *de bonis non*, after it shall have collected what is due and payable by the former executor. The final judgment of the latter court was in settlement of the final account of the removed executor, and not in settlement, as yet, of the estate. It was conclusive of his account and of his relations with the estate, but not of the distribution to be made of that estate among the residuary legatees. Hence, in the case at bar, the action was brought by the successor and not by the residuary legatees.

That an action of debt will lie in the courts of one state upon a decree for the payment of money rendered by a court of chancery of a sister state is fully established.

2 Black on Judgments, 2nd Ed., Sec. 869;

Talmage v. Chapel, 16 Mass., 71;

Moore v. Petty, 68 C. C. A. 306, 135 Fed., 668;

Butler Shoe Co. v. U. S. Rubber Co., 84 C. C. A., 167, 156 Fed., 1.

The efficacy of constructive or substituted service is by no means confined to actions or proceedings *in rem* or in the nature of those *in rem*, as the court below would seem to imply by classing as such the probate court proceeding. Nor is such efficacy affected by the possibility that the action or proceeding *in personam* may result in a judgment for money or in a decree directing payment or delivery thereof.

In the familiar instance of service upon the statutory agent of a foreign corporation, or, failing such agent, upon the insurance commissioner or other official designated by

statute of the state in which service is made, such service will suffice for action on a money demand.

Lafayette Ins. Co. v. French, 18 How., 404;
Mutual Reserve Co. v. Phelps, 190 U. S., 147;
Old Wayne Co. v. McDonough, 204 U. S., 8.

No such distinction is attempted in the qualifying clause beginning,

"Neither do we mean to assert," etc.,

on page 735 of

Pennoyer v. Neff, 95 U. S., 714.

The substituted service in

Vallee v. Dumergue, 4 Exch., 290,

approved in the *Pennoyer* case, and

Chopin v. Adamson, 1 Exch. Div., 17,

approved in

Wilson v. Seligman, 144 U. S., 41,

sufficed to sustain decrees tending to deprivation of property in as true a sense as does the probate court decree.

See also

Works' Courts and Their Jurisdiction, p. 212;
Cooley on Constitutional Limitations (6th Ed.),
 p. 434.

We deem it unnecessary to repeat under this sub-head what is said elsewhere in the argument (sub-heads A, B and C) bearing on the sufficiency of the notice given to sustain the decree rendered.

H. THE PROBATE COURT NOT ONLY HAD JURISDICTION OF THE EXECUTOR FROM THE TIME HE ACCEPTED THAT OFFICE, AND EXERCISED IT IN CALLING HIM TO ACCOUNT, BUT HE HIMSELF INVOKED THAT JURISDICTION WHEN, BY HIS NEXT FRIEND AND ATTORNEYS, HE FILED HIS CROSS-PETITION, ASKING ALLOWANCE OF HIS ACCOUNTS AND THAT HE BE DISCHARGED AS EXECUTOR, AS ALSO WHEN HE OFFERED PROOF IN SUPPORT OF HIS CROSS-PETITION, AND WHEN HE SOUGHT TO APPEAL FROM THE DECREE.

The mere fact that Ferry was adjudged a mental incompetent does not bar a proceeding against him for an accounting of and for the acts done prior to such adjudication. That accounting is by the incompetent, not by his guardian.

Ingersoll v. Harrison, 48 Mich., 234.

In contemplation of law there is a very complete parallel between a lunatic and an infant defendant. Both are *non sui juris*, both are liable to be made defendants and have their rights adjudicated, and in both cases the courts in which the proceedings are had are bound to see that their defense is conducted by a competent person, recognized as such by the court.

Woerner on Guardianship, Secs. 131 and 137;
Sturges v. Longworth, 1 Ohio St., 544, 553.

The completeness of the parallelism should be qualified by the observation that while the infant has never been *sui juris*, the incompetent may have been, and while *sui juris* may have accepted obligations or trusts, or otherwise placed himself in relations, from which he is not released by his subsequent incompetency.

In *Kingsbury v. Buckner*, 134 U. S., 650, the plaintiff, an infant non-resident, had appeared by next

friend, and it was sought to impeach the decree by showing that there was no proof that the next friend had authority to bring the action, and that there was negligence or fraud in its prosecution, but this Court held that such special authority need not be exhibited, and that since the next friend moved in the matter with the approval of those nearest to the infant, there was no ground to say that he acted without authority.

Coming into court in that way, he invoked its jurisdiction just as effectively as if he had instituted a proceeding by service of process.

While the next friend, duly appointed, cannot by any wrongful act on his part affect the rights of his ward, nevertheless he can, when acting in good faith and on the advice of counsel, come into court and give that court jurisdiction. As has so often been said by the courts and text writers, the care which the court exercises over persons *non sui juris* must be "used as a shield and not as a dagger."

In the Matter of Moore, 209, U. S., 490,

the infant plaintiff, by his next friend, brought suit in a state court against a railway company and the defendant petitioned for removal to the federal court. Under *ex parte Wisner*, 203 U. S., 449, the federal court could not take jurisdiction unless both parties thereto consented, and it was held that the infant, by appearing in the federal court by his next friend and counsel upon such removal, consented to the jurisdiction just as effectively as he could have done if *sui juris*. The next friend was there acting in good faith and represented by counsel; and so also in the case at bar the next friend was acting in good faith and was advised and represented by counsel.

See also

Sullivan v. Andoe, 4 Hughes 290, 6 Fed., 641.

The circumstances under which a next friend for Edward P. Ferry was appointed and appeared are set out in folios 5-8 of the record (Trans., pp. 3-5). The cross-petition prayed as affirmative relief that the probate court by order determine that the estate had been fully administered and closed, that the executor be discharged, that his bond as such be cancelled and the sureties thereon released, and that he have such other and further relief as to the court might seem meet. (Trans., pp. 4, 13.)

As stated in

Stevens v. Kirby, 156 Mich., 526,

with reference to this cross petition:

"One David D. Erwin was duly appointed guardian *ad litem* and next friend for the executor, Edward P. Ferry, a conceded mentally incompetent. An answer was duly filed by said executor through his said guardian *ad litem* and next friend. Coupled with this answer was a cross-petition setting forth the 'powers and authorizations' above referred to, alleging that they constituted a settlement of said estate as between the executor and the residuary legatees; that the property had been disposed of by said executor pursuant to those 'powers and authorizations'; that such disposal had been acquiesced in by all the residuary legatees; that if said Edward P. Ferry was liable to them, it was not as executor, but as a trustee under the 'powers and authorizations,' and that a court of equity alone had jurisdiction to fix and determine his liability, and prayed for an order declaring the estate to have been settled, and the executor and his bond discharged from liability. To this cross-petition the original petitioners answered, setting forth, as they claim, that the assets of the estate have been used by said executor and invested in various properties in Utah. Testimony was taken both as to what was done under the 'powers and authorizations,' and also as to the amount of money in the hands of the executor derived from the estate of his testator."

If this cross-petition stood alone, it would raise every question presented in the probate court. Ferry had the right to bring a suit in Michigan, if he desired, and to bring it by general guardian or next friend, when himself incompetent. He brought this cross-proceeding for affirmative relief in the court of his appointment by his next friend named for that very purpose, claiming that he was entitled to credit in his accounts for the sums or properties which he claimed to have turned over to himself as trustee, and that he as executor be acquitted of all liability. It was for that court to determine the issue thus raised, and it did determine it adversely to him by the decree of December 31, 1907. (Trans., p. 13.)

He had made the same contention when ordered to file a more detailed statement of account (Trans., p. 9).

Proofs were taken in behalf of the respective parties, and the accountant was cross-examined by Ferry's counsel with regard to the very account which the court settled. (Trans., pp. 9, 10.)

From that decree he sought to appeal to the circuit court, thereby recognizing the decree as final. (Trans., pp. 19, 20.)

If the decree is not final in Michigan an appeal does not lie.

Erwin v. Ottawa Circuit Judge, 138 Mich., 271.

In

Ferguson v. Oliver, 99 Mich., 161,

action was brought in Michigan against a resident upon a judgment obtained against him in Canada, without service in Canada, although summons had been served on him in Michigan.

The Supreme Court of Michigan, after stating at p. 162, as the settled law of Michigan that a Canadian or foreign court cannot make its judgments conclusive upon a resident of Michigan by service made in Michigan, says:

"In the present case, however, the (Canadian) judgment, after reciting the service in Michigan, has the following further recitation: 'And the said defendant, having appeared and having filed and delivered a statement of defense to the action, and it having been ordered . . . that the said statement of defense should be struck out, and that the plaintiffs should be at liberty to proceed in this action as in case of default of a statement of defense.'"

And the Supreme Court then holds that the jurisdiction of the court became complete by such appearance, and was not divested by the order dismissing the statement of defense, the court remarking:

"Nor can it be doubted that the defendant had a standing in the court *after an appearance which would have authorized an appeal from that determination.*"
[Italics are ours.]

The appeal must be regarded not as a new suit, but as a continuance of the old one.

Freeman on Judgments, Sec. 569;
Nations *v.* Johnson, 24 How., 195.

By attempting to perfect that appeal and instituting various proceedings to that end, he recognized the jurisdiction of the probate court, conceded that he was a party to and bound by its decree, and brought himself squarely within the often repeated ruling of this Court, that when one assails a judgment he admits the existence and finality of it.

Lawrence *v.* Nelson, 143 U. S., 215;
U. S. *v.* St. Louis, Etc., Co., 184 U. S., 247;
Hovey *v.* McDonald, 109 U. S., 150.

And as was well said in

Stevens *v.* Kirby, 156 Mich., 526,

" . . . we must consider that the executor [the respondent here] has all through been represented by well known and competent attorneys in this state of good reputation, and that they in good faith advised the course pursued."

The authority of counsel so appearing and representing is presumed,

Osborn v. Bank, 9 Wheat., 738,

and their appearance is as effective as actual personal service upon him within the state.

Hill v. Mendenhall, 21 Wall., 453;

Laing v. Rigney, 160 U. S., 531.

Old Wayne Company v. McDonough, 204 U. S., 8.

They appeared for him after the decree as well as before the decree. They appeared in the mandamus proceedings which delayed rendition of the decree and by which it was sought to eliminate from that decree the fixing of his indebtedness to the estate. He was thus and otherwise fully apprised at all times of everything that led up to and went into that decree, and was in probate court to respond to it.

CONCLUSION.

For the reasons and upon the authorities thus collated, it is respectfully submitted that the decision of the learned court below was wrong. It was plainly wrong under its own succinct test:

"The cause of action set forth in the complaint rests upon the decree of the Probate Court of Ottawa County that Ferry the individual is liable for a fixed amount of damages for his taking from himself as executor and his conversion to his own use of property of the estate

which came to his hands as executor. If that court has jurisdiction to render that adjudication the complaint stated a good cause of action, if it did not have that jurisdiction the demurrer was rightly sustained."¹⁴ (Trans., p. 32.)

That the probate court had jurisdiction to charge against him in his account all damages sustained for waste as the statute (Sec. 9435) defines waste, and to fix his liability, has been demonstrated.

Whether or not the probate court also had jurisdiction to direct payment, or that the payment, when made, be made to his successor, is not involved in the test which the court below here applies to that decree. But such jurisdiction it clearly had under Michigan jurisprudence, and payment to his successor as decreed will satisfy all claims which any persons interested in the estate might otherwise have had against him.

As adjudicating an individual liability it was properly made the basis of an action against him in Utah.

We submit that, in any event, the opinion below should be reviewed and brought into harmony with the statutes and decisions of Michigan, as they are herein set forth, and particularly with regard to the scope and effect of the accounting proceeding. Certainly the executor had "large sums of money and a large amount of property belonging to said estate" on hand at the time of his second annual account which had disappeared at the time of his final account. (Trans., p. 11.) Should these assets also under the opinion be excluded from the account? We spent four years and a half in that accounting, facing many difficulties as the decree itself shows, and we are loath to believe that while valid in Michigan it is valid nowhere else. That the probate court had jurisdiction over Edward P. Ferry and of the subject matter to some extent is recognized by the Court of Appeals. Where can the line of demarcation be drawn in

the probate decree? What parts of it are binding upon other courts and what parts are not? These are questions which are proper subjects for determination by this Court.

The court below, in its opinion, says of the probate court (Trans., p. 34): [See Note, *supra*, p. 47.]

" . . . that court acquired plenary jurisdiction to adjudicate whether or not he should be removed as executor, whether or not he should account for the unadministered assets of his father's estate, the true state of that account, and whether or not the Trust Company should be appointed administrator *de bonis non*, and its determination of these issues was conclusive,"

and thereafter (Trans., p. 35) it is said:

" . . . the only finding and decree which the Michigan probate court was empowered to make and that which it should have made in the case before it was an adjudication of the amount of the assets of the estate of the deceased that were in the hands of the executor, *Ferry, or unaccounted for by him*, and an order that he pay or deliver them over to his successor in interest."

(The italics are ours.)

It is respectfully submitted that the patent ambiguity presented by these two statements should be rectified. We are here confronted with a decision of the Circuit Court of Appeals holding that the executor can be compelled to account only for "unadministered assets," as that court construes the term, and yet the decision holds that the Michigan probate court could adjudicate the amount of assets of the estate of the deceased that were in the hands of the executor, *Ferry, or unaccounted for by him*, and order that he pay or deliver them to his successor. In legal effect the latter procedure was followed, and yet we are told that it exceeded the probate court jurisdiction.

It needs no demonstration that if this opinion is to stand

uncorrected the resulting conflict between federal and state jurisprudence will prove of great public import, in that it will impede the course of justice and make any State of the Union which follows this opinion an asylum of refuge for the dishonest executors of other States, despite the law in force in the State of appointment.

WILLARD F. KEENEY,
EDWARD B. CRITCHLOW,
HENRY C. HALL,

Attorneys.

CHARLES S. THOMAS,
WALTER I. LILLIE,

Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 200.

THE MICHIGAN TRUST COMPANY, PETITIONER,

vs.

EDWARD P. FERRY.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.**

REPLY BRIEF FOR PETITIONER.

In the statement of the case in respondent's brief (p. 2) it is asserted as a fact that the probate court of Ottawa County was a court of limited jurisdiction, which had no power to render or enforce a personal judgment. If by this it is meant that it is not a common-law court, possessed of the usual powers of a common-law tribunal, we do not dispute the doctrine. But the authorities cited in our first brief abundantly show that it is a court possessed of general jurisdiction over all matters relating to the estates of deceased persons, and as such is empowered to determine the amount due from an executor on settlement of his account.

It is also asserted by counsel (Respondent's Brief, p. 2) that no personal appearance was made by Edward P. Ferry or his general guardians in the proceedings in Michigan, and that the process served by publication, and the pleadings on which the decree of probate court was based, failed to warn or suggest to the persons served that a personal judgment would be taken against the defendant or in favor of The Michigan Trust Company. The facts recited in our first brief show that Edward P. Ferry, through his attorneys, as well as through a guardian *ad litem* and next friend, appeared and answered and filed a cross-petition, asking affirmative relief. Not only this, but a bitterly fought litigation was conducted in the Michigan courts for four and one-half years prior to the rendition of the decree which is the subject-matter of this suit. The case was twice in the Supreme Court of the State. It is once reported as *Erwin vs. Ottawa Circuit Judge*, 138 Mich., 271, where it was sought to obtain the executor's books of account for use in fixing the amount of his personal liability upon accounting, and again in *Stevens vs. Ottawa Probate Judge*, 156 Mich., 526, after that liability was determined and the executor sought to appeal from the decree. It was shown in our first brief that the petition filed in probate court called the executor to account and prayed the appointment of The Michigan Trust Company as administrator *de bonis non* with the will annexed. This, under the Michigan practice, of necessity involved a determination of the amount due and the payment thereof to the administrator *de bonis non*.

Counsel for the executor are in error in asserting (Respondent's Brief, p. 2) that all the specific legacies have been paid. From paragraph XIX of the decree itself (Record, p. 15) it appears that the legacy under clause sixth of the will has not yet been paid.

In respondent's brief (p. 6) it is said that after the rendition of the decree of the probate court of Ottawa County

the guardian *ad litem* attempted to appeal, but failed. Examination of the record and briefs in *Stevens vs. Ottawa Probate Judge, supra*, will disclose that it failed because those representing Edward P. Ferry were unwilling either to furnish the bond for payment of the decree required by the Michigan law or to deposit within the jurisdiction of the Michigan courts stocks or other securities for the performance thereof.

The sole question in this case respects the validity of the decree of the probate court of Ottawa County, Michigan, printed as Exhibit A to the petition (Record, pp. 8-15). To the Circuit Court of Appeals, the members of which are accustomed to a different probate system, the decree seems to exceed the ordinary powers of a court of probate, because establishing what they deem a common-law liability. To one accustomed to practice in Michigan the decree seems, upon the other hand, to be strictly within the accustomed powers of the court of probate.

This case turns, therefore, upon the question of the jurisdiction and powers of probate courts of Michigan. All the ~~objection~~ to the exercise of such jurisdiction and powers are stated with clearness and emphasis in the opinion of Circuit Judge Sanborn, and are reiterated in the brief of respondent with which we are now served. We shall, therefore, advert to those objections and consider whether they are well taken.

L

The power to render a personal judgment against a non-resident upon constructive service of process.

The first division of respondent's brief (pp. 6-19) urges that no court has power to render a judgment upon a purely personal demand, against one who resides beyond the territorial limits of the court, upon service of process on him in the place of his residence and without personal service

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of process upon him within the jurisdiction of the court or his voluntary appearance in the proceeding. We have no quarrel with this general proposition, but, as thus broadly stated, it has not the slightest application to the instant cause.

Various cases are cited by counsel in this part of their brief, but these are all cases in which it has been undertaken to enter ordinary personal judgments or decrees when no service of process within the jurisdiction has been had and there has been no appearance in the action. This is not that case. It is the case of an officer of the court who, in accepting his trust, has bound himself to appear and account, and to accept notice of a requirement so to do in manner as designated by the statutes of the State. That such official is bound by a personal decree rendered upon constructive service of process in mode as directed by the laws of the State where he assumed his trust, is clear upon the authorities contained in our first brief and those hereinafter cited.

In another part of this brief we answer that portion of division I of respondent's brief which relates to the answer and cross-petition (see division X).

II.

The probate court is a court having jurisdiction of probate matters and the settlement of estates and in such matters is a court of general jurisdiction.

It is said in the opinion of the court below that the hearing and adjudication of the cause of action *in personam* against Ferry, for damages caused by his waste and conversion of the assets of the estate of his father, were not within the scope of the jurisdiction of the probate court of Michigan (Record, p. 36). This result the court deduces from the supposed fact that the probate court of Michigan

is a court of limited jurisdiction, and in division III of their brief (pp. 27-35) respondent's counsel make the same argument.

It is asserted (Respondent's Brief, p. 28) that we have stated that the probate court of Michigan has large and equitable powers, and that it is a court of general jurisdiction in probate matters; but it is declared that this is a generality, an exhalation which shines but to deceive. We shall show, on the contrary, that this language is the latest expression of opinion of the Supreme Court of Michigan.

Counsel for respondent (Brief, pp. 29-30, 77-83) undertake to quote the constitutional and statutory provisions of Michigan which confer upon the probate court its jurisdiction and powers, and deduce the conclusion that the settlement of a decedent's estate in Michigan is purely a proceeding *in rem* (Brief, p. 31). But, in arriving at this conclusion, counsel fail to notice certain sections of the statute which to us have an important bearing in this discussion, because they specifically contemplate that the executor, in his account, shall stand charged with all assets coming to his hands, and that the probate court, upon examination of his account, shall determine the amount due from the executor to the estate or from the estate to the executor and make decree accordingly. To some of these sections thus omitted we shall call the court's attention.

From the sections of the Michigan constitution and statutes cited by counsel for respondent (Brief, pp. 29-30, 77-83) it sufficiently appears that the probate court is a constitutional court; that the legislature is invested with broad powers to confer upon it such jurisdiction, powers, and duties as to that body may seem fit; that while various special statutory powers (for example, jurisdiction concurrently with circuit courts to condemn lands, authority to lay out drains, hold inquisitions as to sanity and the like) are conferred upon the probate court, it is, and from territorial days has been, a court of probate, and as such, by express provision of

statute, is possessed of jurisdiction of all matters relating to the settlement of the estates of deceased persons, minors and others under guardianship. William M. Ferry died a resident and inhabitant of Ottawa County, Michigan, and leaving estate therein to be administered; Edward P. Ferry accepted the office of executor, and, by virtue of these facts, under Comp. Laws, sections 650, 651, quoted in respondent's brief (pp. 77-78), the probate court of that county became fully possessed of jurisdiction over that estate and the executor, its officer, which jurisdiction continues until the estate is fully administered as provided by law.

In the court below (Record, p. 36) *Holbrook vs. Cook*, 5 Mich., 225, 228, is cited, as maintaining that parties cannot litigate questions of fact in probate courts except in the instance of probate of wills, or when the power of appointment is to be exercised; and it is likewise cited on page 32 of respondent's brief. That case was decided in 1858. It determines merely that writ of error is not the appropriate remedy to review the action of the circuit court in entering an order *nunc pro tunc* and refusing to audit an administrator's account upon appeal from probate court. The remedy in such case is *certiorari*. The sentence quoted by Circuit Judge Sanborn respecting the power to litigate questions of fact in probate court has long since ceased to be recognized as correctly stating the powers of such court under the Michigan laws, as will be seen from the cases hereinafter cited.

Circuit Judge Sanborn also cites *Detroit, L. & N. R. Co. vs. Probate Judge*, 63 Mich., 376, to the point that jurisdiction over contentious litigation belongs to courts of law and equity, rather than to probate courts, and the case is also referred to on page 32 of respondent's brief. That case was brought by a railroad company to condemn land and has no relevancy in this discussion. The plain distinction between the exercise of jurisdiction as a court of probate and the exercise of a special statutory power appears upon refer-

ence to United States Gypsum Company *vs.* Circuit Judge, 150 Mich., 668, 673, where it is said:

"Proceedings to condemn land are special and summary in character, and, while subject to judicial review and supervision for certain purposes, *are not judicial proceedings*. Toledo, etc., R. Co. *vs.* Dunlap, 47 Mich., 456, 462; Michigan, etc., R. Co. *vs.* Monroe Circuit Judge, 144 Mich., 44.

* * * The jurisdiction of the probate court in condemnation proceedings is not a part of the ordinary and general jurisdiction of that court. *It is no other or different than that conferred, in the same statute, upon the circuit courts.*"

The circuit court of appeals was, therefore, plainly misled when it cited the case in the 63d Michigan as authority to the point that there was no jurisdiction in the probate court to render a decree against Edward P. Ferry for assets converted by him. It might just as fitly have argued therefrom that the circuit court was also of limited jurisdiction and unable to render a judgment *in personam*, because, forsooth, proceedings brought in that court to condemn lands are also special and summary in character and "are not judicial proceedings."

This indisputably appears from other Michigan cases.* In Toledo, etc., R. Co. *vs.* Dunlap, 47 Mich., 456, proceedings to condemn land were begun *in the circuit court*, a court of general jurisdiction. Yet Justice Campbell said (page 462):

"The proceedings to condemn lands, although made under the railroad laws subject to judicial review and supervision for certain purposes, are not in themselves and never have been regarded as judicial proceedings. Our Constitution allows them to be conducted by highway commissioners in some cases, and by specially appointed commissioners or juries of freeholders. The inquiry in this State, as elsewhere, is an appraisal or estimate of values, and not a contest on litigious rights, and includes what is

not elsewhere included, an inquiry into the necessity of the proposed taking for public purposes, which was never made by courts, but always heretofore by the Legislature or *some unjudicial body* of its creation. * * * But the nature of the proceeding remains as before, a special proceeding by a temporary tribunal selected for the occasion, and not a judicial proceeding in the ordinary sense."

To the same effect are Port Huron & South-western Railroad Co. *vs.* Voorheis, 50 Mich., 506, 507; Derby *vs.* Gage, Saginaw Circuit Judge, 60 Mich., 1, 4, and Hartz *vs.* Wayne Circuit Judge, 164 Mich., 231, 233-234. The circuit court of appeals was therefore plainly in error in relying on the two Michigan cases cited by it (Record, p. 36) as authority for the proposition that the probate court of Ottawa County exceeded its jurisdiction in finding a balance due from Edward P. Ferry on the accounting and directing payment thereof.

On page 33 of their brief respondent's counsel cite Hilton *vs.* Briggs, 54 Mich., 269, to show the limited jurisdiction of probate courts. The case has no bearing in this discussion. That was a case in which an order was entered for payment of claims *ex parte* and without notice to the administrator. This, of course, did not bind the administrator; neither did a subsequent order granting leave to prosecute the administrator's bond. This for the plain reason that the order did not undertake or purport to fix the administrator's liability, but left that to be determined in subsequent proceedings. The case has, therefore, no authority in the consideration of an executor's accounting, where the liability of the executor is definitely fixed by the decree of the probate court.

Similar considerations apply to the case Schlee *vs.* Darrow Estate, 65 Mich., 362, also cited by opposing counsel (Brief, p. 33). It merely holds that when application is made in probate court for leave to sue a guardian's bond the court in granting leave to sue does not fix the liability of either prin-

cipal or surety on the bond. In support of this ruling the court follows a Massachusetts case cited by it (65 Mich., 375). As we have seen in our first brief, the holding in both Massachusetts and Michigan is different as respects the right, upon an executor's accounting, to determine his liability for a net balance.

In our first brief (p. 38) we cited Michigan cases to support the proposition that the probate court is a court having jurisdiction of probate matters and settlement of estates, and in such matters is a court of general jurisdiction. To the citations there made we desire to add a more recent decision, *Nolan vs. Garrison*, 156 Mich., 397, 399. It is there said by Chief Justice Blair:

"We think it must be held that, under the provisions of chapter 33, §§ 646-701, 1 Comp. Laws, and chapter 234, §§ 8697-8747, 3 Comp. Laws, the probate court has exclusive jurisdiction of the settlement of the estates of mentally incompetent persons under guardianship, except where its remedies are inadequate, unless by the amendment of 1871 (Act No. 39, Laws 1871, section 651, 1 Comp. Laws), it was intended to give to the chancery courts concurrent jurisdiction of such cases."

In support of this proposition the Chief Justice cites:

People vs. Wayne Circuit Judge, 11 Mich., 393.
Holbrook vs. Campau, 22 Mich., 288.
Dickinson vs. Seaver, 44 Mich., 624.
Church vs. Holcomb, 45 Mich., 29.
Morford vs. Dieffenbacher, 54 Mich., 593.
Schlee vs. Darrow's Estate, 65 Mich., 362.
In re Andrews' Estate, 92 Mich., 449.
Nester vs. Ross' Estate, 98 Mich., 200.
Cole vs. Cole's Estate, 125 Mich., 655.

To which list may be added:

Kellogg vs. Aldrich, 39 Mich., 576.
Winegar vs. Newland, 44 *id.*, 367.

Chief Justice Blair then calls attention to the fact that section 651, 1 Comp. Laws, appears in the Revised Statutes of 1838 (part 3, tit. 1, chap. 4, § 4) as follows:

"The judge of probate shall have jurisdiction of all matters relating to the settlement of the estates of such deceased persons, and of such minors and others under guardianship."

By act No. 39, laws 1871, the section was amended by adding the proviso, as it appears in section 651, 1 Comp Laws:

"Provided, however, that the jurisdiction hereby conferred shall not be construed to deprive the Circuit Court in Chancery, in the proper county, of concurrent jurisdiction as originally exercised over the same matters."

It is then said (156 Mich., 400) :

"The section was further amended in 1905 by enlarging the power of the judge of probate, so that he might 'grant rehearings and may modify and set aside orders, sentences and decrees rendered in such court.' Act No. 271, Pub. Acts 1905."

The Chief Justice then refers to some of the earlier decisions of the Supreme Court, in considering the statute above noted, and says (156 Mich., 401) :

"These opinions have frequently been cited with approval since the adoption of the amendment, and the practice has been in accordance with them. *To hold that the amendment had the effect to confer upon the court of chancery full concurrent jurisdiction of all matters relating to the settlement of the estates of such deceased persons, and of such minors and others under guardianship,* as originally exercised by the court of chancery in England, *would be to revolutionize our practice as understood by the bench and bar throughout the history of our State.*

"We are of the opinion that it was not the inten-

tion of the legislature by the amendment to confer upon the court of chancery the powers originally exercised by that court, but that it was the intention, as declaratory of the existing law, to remove any doubt as to the power of the court to exercise its general inherent equity powers *where the remedies in the probate court were inadequate*, and that the expression, 'originally exercised over the same matters,' should be construed as referring to the exercise of the inherent equitable powers of the court as theretofore exercised in Michigan. *State vs. Ueland*, 30 Minn., 277."

It is therefore held by the court that the common-law courts may not enforce their judgments against a mentally incompetent person by the ordinary process of execution, but that their power is exhausted by the rendition of judgment, and the payment must usually be enforced by suit upon the executor's bond.

As one reason why the probate court should not be deemed to be possessed of jurisdiction to render a decree against the executor for moneys converted by him, it is urged by the court below, and in the brief for respondent in this court, that the orders and decrees of probate court in Michigan create no liens, and may not be enforced by execution (Record, pp. 35-36; Respondent's Brief, p. 31), but the judgment of a court of general common-law jurisdiction, or the decree of a court of chancery, creates no lien in Michigan, in the absence of execution and levy thereunder. The holding of the court in *Nolan vs. Garrison*, *supra*, is directly to the point that while a common-law court has power to render a valid judgment it does not necessarily possess the power to issue execution to enforce the same. Then, too, courts of chancery in Michigan possess no power to issue execution to enforce their decrees, except by provision of statute, now found as Comp. Laws 1897, sec. 468. In the absence of such statute the remedy is by attachment. Yet no one ever doubted the power of a court of chancery to

render a valid decree *in personam* upon which suit in another jurisdiction might properly be founded. This subject has been considered in our first brief (p. 98), and it is there shown that the power to issue execution has no bearing upon the question whether the judgment or decree is valid or binding.

III.

The probate court for the county of Ottawa had authority to determine the amount due by Edward P. Ferry as executor of his father's will.

With all deference we submit that the circuit court of appeals fell into serious error respecting the jurisdiction and authority of probate courts deriving their powers from the constitution and statutes of Michigan, and counsel for respondent fall into the same error in the discussion of this subject in division III of their brief (pp. 27-35).

It is conceded in the opinion of the circuit court of appeals that the statutes of Michigan grant power to the probate court to require every executor appointed by it to render to it an account of all moneys and other property of the estate he is administering in his hands as such executor, and of the proceeds and expenditures thereof (Record, p. 33). But the court proceeds to draw a distinction between the rendition of such account and the fixing of the balance due from the executor on such accounting. We respectfully submit that this distinction is unknown to the laws of Michigan, and that, according to the law of that State, the fixing of the balance due from the executor is a customary and usual feature of the proceeding for an account.

In discussing the validity of the decree of the probate court of Ottawa County, Circuit Judge Sanborn first adverts to what was within the jurisdiction of that court. Upon that subject he says (Record, pp. 34-35):

"The petition of the residuary legatees and the notice of hearing thereon which was published pursuant to the statutes gave the defendant ample warning that the question whether or not he should be removed as executor, whether or not he should be ordered to account for the residue of the estate of his father unadministered, and whether or not the trust company should be appointed administrator *de bonis non* in his place, would be considered and might be decided by the court at the hearing. When the office of executor was tendered to him by that court the statutes of Michigan provided that, if he accepted that office, that court might acquire jurisdiction to determine all these issues between him and the legatees of his father's estate upon a service of a notice of the time and place of hearing upon him by publication. That office was tendered to him on the condition imposed by these statutes that the probate court should have the power to call him before it and to adjudicate these issues for or against him without other warning than a notice published in a newspaper, and he necessarily accepted that condition when he accepted his office. That condition was not limited to instances in which one or more of these issues should arise while he was in the State of Michigan, but it included all cases in which one or more of these issues should arise while he was executor and was as effective after as before his departure from the State. One who accepts an office, a right, or a privilege bestowed by virtue of the statutes of a State which provide that the courts of that State may acquire jurisdiction to determine specified controversies between him and others by means of a published notice of hearing thereof, consents to the service of notice in that way and is estopped from denying its sufficiency. By the defendant's acceptance of the office of executor from the Michigan probate court and by that court's published notice of the time and place of its hearing that court acquired plenary jurisdiction to adjudicate whether or not he should be removed as executor, whether or not he should account for the unadministered assets of his father's estate, the true state of that account, and whether or not the trust company should be ap-

pointed administrator *de bonis non*, and its determination of these issues was conclusive. *Spencer vs. Houghton*, 68 Calif., 82, 88, 89; *Trumpler vs. Cotton*, 109 Calif., 250, 254, 255; *Moore vs. Fields*, 42 Pa. St., 467, 473; *Martin vs. Martin*, 214 Pa. St., 389, 394; *Usry vs. Usry*, 8 S. E. (Ga.), 60, 61; *Stevens vs. Kirby*, 121 N. W. (Mich.), 477, 480."

Confessedly, therefore, "*the true state*" of *Edward P. Ferry's account as executor* was a subject within the jurisdiction of the probate court, and, furthermore, "*its determination of this issue was conclusive*." But, having reached this conclusion, Circuit Judge Sanborn proceeds in effect to declare that, if it is made to appear that the executor has misappropriated assets of the estate, it is beyond the jurisdiction or power of the probate court to determine the amount of that misappropriation or fix the balance due from the executor. He says (Record, p. 35):

"It is one thing, however, to adjudge the true state of the account of the assets of an estate in the hands of an executor and to require him to pay or deliver them to his successor and a very different thing to adjudge that the person who holds the office of executor has taken assets of the estate from himself as executor, has committed a *devastavit* and is personally liable in damages therefor in a specific amount and to require him to pay that amount out of his individual property. The former is a determination of the true state of the account of the assets of the estate between the executor and the estate, the latter is the adjudication of the liability of a person and of his individual property for a tort, or if the tort be waived, for a debt. The former was within the scope of the jurisdiction of the Michigan probate court because it was a determination, after due notice of its proposed action, of the state of the *res* that was the subject of the proceeding before it, the latter was the adjudication of a challenged cause of action *in personam* at common law. * * *

"The only finding and decree which the Michigan probate court was empowered to make and that which

it should have made in the case before it was an adjudication of the amount of the assets of the estate of the deceased that were in the hands of the executor Ferry or unaccounted for by him and an order that he pay or deliver them over to his successor in interest. The limit of its power was such an order and a proceeding for contempt for its disobedience, which would have been futile because the person of the defendant Ferry in Utah was beyond reach of the process of the Michigan court."

We quote thus at length from the opinion of Judge Sanborn in the court below for the reason that the quotations so made show the cardinal error into which that court fell and which permeates its entire opinion. We respectfully submit that it is not the law of Michigan that, if an executor misappropriates money coming into his hands as such, the limit of the power of the probate court is to proceed for contempt for disobedience of the order of that court, and that only a common-law court has power to fix the money balance owing by the executor and to direct its payment. On the contrary, from the time of the admission of Michigan into the union of States, its probate courts have been invested with authority to call executors and administrators to account, to fix and determine the balance due and owing by them to the trust, and to direct payment thereof, whether such balance does or does not consist, in whole or in part, of moneys converted by them to their individual use.

(a) *The statute of 1901.*—By clear implication our position in this regard is upheld, and the validity of the decretal order of the probate court of Ottawa county is recognized by the decision of the Supreme Court of Michigan in this Ferry litigation. We refer to *Stevens vs. Ottawa Probate Judge*, 156 Mich., 526. After the decretal order of December 30, 1907, was entered in the probate court for Ottawa County, Edward P. Ferry, the executor, undertook to appeal therefrom, for the reason that by that order he was found in-

debted in a large sum and was directed to pay the same to The Michigan Trust Company, the administrator *de bonis non* with the will annexed. But the executor was unwilling to furnish security for the payment of the amount found due, and was likewise unwilling to deposit, within the jurisdiction of the Michigan courts, stocks or other securities for the payment of the decree so rendered. He therefore tendered an appeal bond in the penalty of only \$10,000, and the probate judge refused to accept it. Mr. Stevens, as guardian *ad litem* and next friend of Edward P. Ferry, then brought *mandamus* in the circuit court for Ottawa County to compel the probate judge to accept the appeal bond tendered. The writ was refused, and on *certiorari* this decision was affirmed by the Supreme Court.

The question arose under Comp. Laws of Michigan, 1897, §670, as amended by act 92, Pub. Acts 1901, a statute to which no reference is made in the brief for respondent. This statute reads as follows:

"The party appealing shall, at the time of filing notice thereof, file with the judge of probate a bond to the adverse party, in such penalty and with such surety or sureties as the judge of probate shall approve, conditioned for the diligent prosecution of such appeal and the payment of all such damages and costs as shall be awarded against him, in case he shall fail to obtain a reversal of the decision so appealed from. *And in case any person appeals from the allowance and findings of the court upon the examination of his account as executor, administrator, guardian or trustee, the court may, in its discretion, fix the penalty of the bond in such sum as will cover the amount found due by the probate court upon examination of such account, in which case the bond and sureties thereon shall be liable to the amount of such bond for the amount found due by the probate court or the appellate court upon the final determination of such appeal, including the costs and damages awarded by such appellate court.*"

We claimed in behalf of the administrator *de bonis non* and the residuary legatees that, under this statute, we were entitled to an appeal bond to secure the money judgment or decree of the probate court of Ottawa County. Counsel for Edward P. Ferry contended that a bond should be given only for costs of suit.

Upon examination of the opinion in that case (156 Mich., 526-537), it will be noted that the able counsel appearing for the executor did not deny the authority of the probate court to render a decree against an executor for moneys of the estate converted to his own use. That jurisdiction is too well settled in Michigan to allow such contention there. Counsel contended rather that the probate court did not pursue the proper practice when it disposed in the decree of the question of the obligation of the executor to account, and likewise determined, in the same decree, the amount owing by him. It appears from the decision of the Michigan Supreme Court that, except such account as was contained in the answer and cross-petition, the powers, authorizations and certain other exhibits (156 Mich., 530, 534), the executor refused to render an account, and therefore an account was stated for him by the residuary legatees. The executor contended that the court ought not to have rendered, in the first instance, a money decree against the executor, but should have passed merely upon the obligation of an executor to account and had this been done, no specific sum being found due from the executor for moneys or properties of the estate converted by him, an appeal could have been taken by the executor without giving a bond to secure the amount found due. The specific question of the right to render this personal decree against the executor for the balance owing was thus placed directly in issue. The executor's contention was repudiated by the court. Mr. Justice Grant, in the opinion, said (156 Mich., 534):

"It would have been entirely proper for the judge of probate to adopt that course, but he was under

no legal obligation to do so. While the judge of probate did not expressly decide this question, yet he did so by clear implication; *otherwise he would not have proceeded to an accounting.*

"Three questions were involved in the original petition and answer: (1) *The removal of the executor;* (2) *his liability to an account;* and (3) *an accounting.* It was entirely proper for the court to take testimony upon these questions, and decide them by one decree."

This is an express decision that it was entirely proper for the probate court in one decree to determine the obligation to account, and also to fix the amount owing by the executor and direct its payment. For this reason the court determined that the executor was not entitled to take an appeal unless he gave bond to secure the one-half part of the sum found owing by the executor to the estate, viz., the one-half part of \$1,220,473.44. In arriving at this conclusion the court took into consideration the fact that Edward P. Ferry was himself entitled to a one-fourth interest in the estate, and that Thomas W. Ferry was entitled to another one-fourth thereof, and that there were supposed to be unsettled equities between Thomas and Edward which the court took and considered as bearing upon the amount of the bond.

Mr. Justice Grant also suggested that executors and trustees are not generally liable for interest on trust funds in their hands, and said that long silence might furnish a reason why interest should not be charged, if the executor is liable to an accounting. He added (156 Mich., 536):

"But these are questions which have been passed upon by the probate court and determined against the contention of the relator."

The case of *Stevens vs. Ottawa Probate Judge*, therefore, can be construed only as a recognition that the probate court of Ottawa County had jurisdiction to render a decree against Edward P. Ferry for the amount of the assets of his father's

estate converted by him, as well as for interest thereon, and that the decree so rendered against Edward P. Ferry in that court is binding in the absence of appeal. If the reports of the Supreme Court of Michigan are not filled with discussions of the power of the probate court to render a decree for the balance due by an executor or administrator upon his accounting, it is not because the power to render such decree is believed in that State to be doubtful. It is rather because it is so well settled and in such familiar, if not daily, use in the probate courts of that State, that the exercise of this authority passes unquestioned.

In the absence of interpretation by decision of the Supreme Court of Michigan, the act No. 92 of Public Acts, 1901, above quoted, of itself suffices to make this authority clear. That statute contemplates the case where the probate court states the account of an executor, and further contemplates that its decision is not open to attack or question except on appeal. If the appeal be taken by the executor, the bond is to be given—

"in such sum as will cover the amount found due by the probate court upon examination of such account."

What is the liability upon such bond? The statute itself makes answer:

"The bond and sureties thereon shall be liable to the amount of such bond for the amount found due by the probate court or the appellate court upon the final determination of such appeal, including the costs and damages awarded by such appellate court."

The obvious, the cardinal purpose of this statute is to require a bond for sums misappropriated by the executor, and to preclude him—in the discretion of the judge of probate—from taking an appeal until or unless he gives such bond. It is absurd to say that the statute intends to require a bond to pay the decree from an executor who has the funds of the

estate on hand intact, and in whose case, therefore, no bond is needed, and to require no bond from an executor who has converted the moneys of the estate to his own use, and a bond from whom is therefore urgent. It is equally clear that the statute contemplates the case of the rendition of judgment or decree which will definitely fix the precise amount owing by the executor, and direct payment thereof, and that the size of the bond is to be regulated by the amount so adjudged.

(b) *Other Statutes.*—Independent of the act of 1901, we are at loss to perceive how any other decision is possible under the plain language of the Michigan statutes, which direct that the executor be charged in his account with all assets coming to his possession, and that if he neglect to pay over any money he shall have in his hands the same shall be deemed waste and the damages sustained may be charged against the executor in his account. We refer to sections 9428, 9429, 9430, and 9435, Comp. Laws 1897, which seem not to be referred to in respondent's brief, and the specific language of which we venture to give because we deem them of controlling importance:

(9428:)

"Every executor and administrator shall be chargeable in his account with the whole of the goods, chattels, rights and credits of the deceased, which may come to his possession; also, with all the proceeds of the real estate which may be sold for the payment of debts and legacies, and with all the interest, profit and income which shall in any way come to his hands from the estate of the deceased."

(9429:)

"Every executor and administrator shall account for the personal estate of the deceased, as the same shall be appraised, except as provided in the following sections."

(9430:)

"An executor or administrator shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the personal estate; and he shall account for the excess, when he shall sell any part of the personal estate for more than the appraisal, and if he shall sell any for less than the appraisal, he shall not be responsible for the loss, if it shall appear to be beneficial to the estate to sell it."

(9435:)

"When an executor or administrator shall neglect or unreasonably delay to raise money, by collecting the debts or selling the real or personal estate of the deceased, or shall neglect to pay over the money he shall have in his hands, and the value of the estate shall thereby be lessened, or unnecessary cost or interest shall accrue, or the persons interested shall suffer loss, the same shall be deemed waste, and *the damages sustained may be charged against the executor or administrator in his account*, or he shall be liable therefor on his administration bond."

If these provisions of the statute stood alone and without express decisions of the court or long-settled usage to explain them, the authority of the probate court of Ottawa County to render a decree against Edward P. Ferry for the balance owing by him would be clear. But they do not stand alone.

The leading case in Michigan upon this question is *Hall vs. Grovier*, 25 Mich., 428, 432, 436, cited in our first brief (pp. 44-45). It is not necessary to add to what is there said. The case unequivocally maintains that if moneys are misapplied by an executor the same, in contemplation of law, are still in his hands, and are properly chargeable against him in his account, and that the settlement in probate court of the account is an adjudication upon each item thereof.

We also beg to call attention to two late Michigan cases not cited in our first brief.

In re Saier's Estate, 158 Mich., 170. In this case one Zimmer presented his final account as administrator with the will annexed of Elnora Saier's estate. The account was allowed in probate court, and Charles Saier and others interested in the estate appealed to the circuit court. In that case a judgment was rendered allowing the account in part only, and such judgment was reviewed by the administrator on writ of error. On page 173, in the opinion of Justice McAlvay, it is said:

"The trial court surcharged his account with certain items for uncollected rent, interest on a certain claim, interest and charges on taxes neglected, and interest on semi-annual balances. We think such finding was warranted by the evidence. Appellant had failed to make deposit as he should have done, and had commingled the estate with his own funds, and thereby lost to the estate 3 per cent on semi-annual balances. The rent charged was lost by his neglect, and the interest was on a claim he was ordered by the court to pay, which order he neglected to obey. The foregoing shows the character of the items disallowed or surcharged in this case by the trial court. Many other items were disallowed, and in tracing them in the record we find that in each instance the court was correct in so doing."

From the foregoing it will be perceived that the account of the administrator was surcharged for damages sustained by the estate by reason of his neglect. It was also surcharged for interest, because the administrator commingled the estate with his own funds and thereby lost interest to the estate.

A recent case in Michigan relating to the jurisdiction of probate courts is *Davis vs. McCamman*, 165 Mich., 287. There a bill in chancery was filed by heirs-at-law and distributees against an administrator for an accounting. It

was charged, among other things, that the inventory returned by the administrator was grossly false and fraudulent; that assets specifically named were falsely and fraudulently withheld therefrom; that the administrator had falsely and fraudulently appropriated certain properties to his own use and benefit, and other instances of fraudulent misconduct by him were set forth. It was further recited that final account of the administrator had been filed and allowed in probate court. Plea to the bill was filed on the broad ground that the matters alleged in the bill related to the settlement of an estate of which the probate court had exclusive jurisdiction and that the equity court was not entitled to usurp that jurisdiction and settle the estate.

Mr. Justice Blair, in the opinion of the court, said (pp. 291-293):

"The probate court has exclusive jurisdiction over the settlement of the estates of deceased persons, except where its remedies are inadequate, or the interposition of equity is necessary for some auxiliary purpose. * * * Conceding that, where fraud has been discovered too late to apply to the probate court for relief, the court of chancery has jurisdiction, in aid of the probate proceedings, to set aside orders fraudulently procured:

"He who invokes the aid of a court of equity to set aside a judgment rendered against him in a court of law must show by his bill that he has been diligent in prosecuting his remedy at law. If he had the opportunity to interpose his defense at law and failed to avail himself of it, a court of equity will close its door to him.' *Weisman vs. Beef Co.*, 154 Mich., 511 (118 N. W., 2). * * *

"There is no allegation in the present bill of complaint of any diligence whatever on the part of complainant Smith in protecting her rights; nor that she discovered the frauds complained of too late to bring them to the attention of the probate court and procure the correction of the accounts; nor that she was ignorant of their existence; nor that they were not passed upon by the probate court. There is no

allegation that she did not have due notice and opportunity to be heard with full knowledge of the facts. There is no explanation offered in the bill as to why she did not appeal to the circuit court or petition the probate court to set aside the orders. In short, so far as anything to the contrary in this bill is concerned, the complainants, with full information as to the facts necessary to protect their rights, have voluntarily delayed until their remedies at law have been lost by lapse of time. The record shows that the probate proceedings were regular; the bill does not successfully impeach them for fraud; and the bill of complaint was properly dismissed."

This decision is, therefore, expressly to the effect that, if the administrator had fraudulently converted to his own use assets of the estate, the remedy was not by bill in equity, but by opposing the administrator's account in probate court and procuring in that court the correction thereof; but that remedy had not been pursued, and relief was denied for the specific reason that it was not shown that the frauds complained of had not been passed on in probate court, and that, if so passed on in that court, they could not be successfully impeached except for fraud.

(c) In our brief in the Supreme Court of Michigan, in *Stevens vs. Ottawa Probate Judge*, 156 Mich., 528, we argued the specific point that the probate court had power to proceed and state the account and determine how much was due from the executor. As we have already seen, the Supreme Court of Michigan upheld that contention. In support of that proposition, we cited in that court the following cases:

Murray vs. Wood, 144 Mass., 195.

Probate Court vs. Chapin, 31 Vt., 373.

Spencer vs. Houghton, 68 Cal., 82.

Trumpler vs. Cotton, 109 *id.*, 250.

Moore vs. Fields, 42 Pa. St., 467.

In *Murray vs. Wood, supra*, a ward, after coming of age, was held not entitled to prove against the estate in insolvency of his guardian a claim for the property which came into the hands of the guardian, until the latter has settled his account in the probate court or until a judgment has been obtained upon his bond. Mr. Justice Field, for the court, said (p. 197):

"It is probably true that, if he (the guardian) neglects or refuses to render any account, the probate court can still proceed to take an account, and determine how much is due from him, even if he is beyond the reach of process. Such a proceeding may be necessary, when the bond for any reason was invalid, or the penalty was insufficient; but, until the amount has been determined in the probate court, an action cannot be maintained, either at law or in equity, in the name of a ward against a former guardian to recover what is due on a settlement. As this amount had not been determined in the probate court, and as no suit had been brought and no judgment obtained on the bond, the plaintiff had, when she presented her claim, no provable debt against the estate in insolvency."

In *Probate Court vs. Chapin*, 31 Vt., 373, it was held that the failure of an administrator to render his account in the probate court, when cited to do so, does not of itself give a right to the recovery of more than nominal damages in an action upon his bond. In order to enable a creditor to recover more than nominal damages in such an action, a decree of the probate court must have been made directing a distribution of assets among creditors, and the time limited for such distribution must have expired. The court, per Judge Poland, said:

"The plaintiffs seem to have supposed that, if the administrators failed or refused to appear and render their account when properly cited before the court, that the power and duty of that court have come to an end, and that their only further remedy

was a resort to a suit on the bond. But we think not. The necessity of a settlement of the estate, and a decree for the payment of the plaintiff's debts, or some dividend thereon, was still just as necessary as before. * * *

"The failure or refusal of the defendants to appear, when cited, and render their account, might make it more difficult for the plaintiffs to procure the necessary decree from the probate court, but it by no means prevented the court from proceeding to make one. The probate court might doubtless proceed by the compulsory power given by the statute to that court, to compel the attendance and examination of the administrators, or they might proceed against them for disobeying the order of the court, or they might remove the administrators. *The court might also proceed in the absence of the administrators, and make them chargeable with all the property inventoried, and any other assets shown to have come to their hands, and would be justified in making all reasonable presumptions against them from their failure to appear*, perhaps to the extent of presuming funds in their hands sufficient for payment of all the debts, and decreeing accordingly."

We understand that the statutes of Massachusetts regulating probate practice have been substantially adopted in Vermont, in like manner as in Michigan.

IV.

The decree of December 31, 1907, made by the probate court of Ottawa County, properly directed Edward P. Ferry to pay to The Michigan Trust Company, administrator de bonis non with the will annexed of his father's estate, the amount found due by him on examination of his executor's account.

The circuit court of appeals affirmed the contrary of this proposition, and respondent's counsel argue in support of that decision in division IV of their brief (pp. 36-40). That we may fairly state the position taken by that court, we

advert to the language used by Circuit Judge Sanborn in his opinion (Record, pp. 36-37) :

"But at common law an administrator *de bonis non* takes the goods, chattels and credits of the deceased which have not been administered only and all his *property which has been mixed with that of the former executor or administrator, or which has been converted to his individual use, or into another form, in short all property of the deceased which does not remain in specie is administered and not unadministered property.* The former executor is liable to creditors, legatees and distributees only for his conversion and waste of the assets of the estate and they may maintain suits against him therefor. He is not accountable to an administrator *de bonis non* for such maladministration or for anything except the goods and personal property of the deceased in his hands *in specie*, and no court has jurisdiction to render decrees or orders against him for damages for delinquencies or devastavits in favor of a successor administrator unless expressly authorized to do so by the statute under which it acts. * * *

"This was established and familiar law when the Michigan statutes were enacted, but they granted no authority to an administrator *de bonis non* to recover from a former executor or administrator debt or damages for his conversions or delinquencies and gave no jurisdiction to the probate courts of that State to decree or order the payment of such debts or damages to him."

In effect this excerpt declares that an executor who *converts the assets of the estate to his own use "administers" such assets*, and that it is for this reason that no recovery can be had against him in probate court, and that it is beyond the jurisdiction of that court to award payment to the administrator *de bonis non*. This likewise is the argument made by respondent's counsel (Brief, pp. 37-40).

With all respect we submit that this argument utterly mistakes the scope and effect of the Michigan statutes and

ignores the decisions of the Supreme Court of that State as well as the practice which has prevailed in the probate courts of Michigan since its admission to the Union.

(a) If it be conceded that the quotation made from the opinion of the circuit court of appeals correctly states the doctrine which prevailed at the common law, that is a question which is not material in this discussion. The sole question is whether it correctly states the rules which prevail under the statutes of the State of Michigan, as construed by its own courts, as well as under the law declared in sister States of the Union where similar statutes prevail. It will be seen, upon examination, that the statutes of Michigan, as so construed, have not only altered the rule of the common law, but have rendered it wholly inapplicable in the instant cause.

In the determination of this question it is not necessary to find, upon the statute books of Michigan, a provision *in haec verba* calling attention to this rule of the common law and repealing it. If the statutes of Michigan, as interpreted by the courts of that State, so far change the system of the administration of estates that the so-called common-law system is no longer applicable, that will suffice. In determining this question it will be useful to pause for a moment to consider the reasons upon which the common-law rule, as stated by Judge Sanborn, was based. These reasons are distinctly stated in the early case of *Coleman, Administrator de bonis non, vs. McMurdo*, 5 Rand. (Va.), 51. This was a suit in chancery, decided in 1827. An administrator *de bonis non* filed his bill to secure an accounting against the representatives of an administrator who had committed a *devastavit*. Two questions were discussed by the court: First, What was the common law? and, second, whether this common law had been altered by any statute of the State of Virginia. On page 55, speaking of the title and power of the administrator *de bonis non*, the court said:

"His commission gave him power to act, and to represent the testator or intestate, so far (and so far only), as there remained *unadministered* 'goods, chattels, and credits, which were of the testator or intestate, at the time of his death.' This definition turns our minds at once to the question, what amounts to an administration of assets, so far as regards the administrator *de bonis non*. Executors and administrators took the legal title to the goods and chattels of the deceased; nor were they before the Statute of Distributions, 22d and 23d, ch. 2 (1870), bound to distribute the surplus after the payment of debts and legacies. Both held *in autre droit*; and therefore, neither could dispose by will of the property remaining in *specie*; but both had the power, while living, of changing, altering, and converting the property; and whatever was thus altered or converted, became their own goods, and descended, on their deaths, to their own representative. Such change or conversion of the goods, was (so far as regarded the administrator *de bonis non*) a complete administration, and put them as effectually beyond the reach of his commission, as if they had never belonged to the testator or intestate."

We cite this case because it is an early case in support of the so-called common-law doctrine and is frequently referred to throughout the entire line of decisions which follow that doctrine, including the leading decisions in this court, *Beall vs. New Mexico*, 16 Wall., 535, and *United States vs. Walker*, 109 U. S., 258. We submit that the reason of the rule has not the slightest application under the statutory system of probate law which has prevailed in Michigan since the organization of that State.

Counsel for respondent rely greatly in their brief upon *United States vs. Walker*, *supra*, but this relates solely to the rule of law as it exists in Maryland, where the so-called common-law rule was unaltered by express statute or by the interpretation placed by the State court upon the statutes of that State. This likewise clearly appears upon inspection

of *Ennis vs. Smith*, 14 How., 400, 416. So, also, *Beall vs. New Mexico*, *supra*, passes merely upon the common-law rule as unaltered by any statute or decision of the territorial court, and recognizes that a different rule prevails under statutes existing in some of the States.

(b) In respondent's brief (pp. 38-39) the case of *Reed, Admx., vs. Hume, Admr.*, 25 Utah, 248, is cited as an authority to the point that an administrator *de bonis non* is entitled only to goods that remain *in specie*, and that, if the administrator convert moneys to his own use, this is an administration thereof. This is the rule announced by the Utah court in the absence of statute, and has no application under such statutory system of law as that which prevails in Michigan.

But counsel urge (Brief, p. 38) that, even if the statutes of Michigan allowed a suit of this nature, it would not be recognized by the courts in Utah, for the Utah courts are not bound to enforce a judgment in another State contrary to the policy, settled rules and decisions of the former State. This position is clearly untenable. The question relates solely to the jurisdiction of the probate court of Michigan to award a decree in favor of an administrator *de bonis non* and that is a question for the courts of Michigan to determine; and we respectfully submit that, under the rule of law as declared by that court, the probate court of Ottawa County was possessed of jurisdiction to render the decretal order which is now the subject of review.

In *Standard Oil Co. vs. Missouri*, 224 U. S., 270, 280-281, the rule upon this subject is stated by Mr. Justice Lamar in these words:

"It is, of course, essential to the validity of any judgment that the court rendering it should have had jurisdiction, not only of the parties, but of the subject-matter. * * * But it is equally well settled that it is for the Supreme Court of a State finally to determine its own jurisdiction and that of other

local tribunals, since the decision involves a construction of the laws of a State by which the court was organized."

(c) From the authorities cited in our former brief, it appears that the circuit court of appeals fell into grievous error when it declared that, under the laws of Michigan, the former executor is not liable to an administrator *de bonis non* for assets of the estate converted by him, but only for goods and personal property of the deceased in his hands *in specie*, and that there is no jurisdiction in the probate courts of Michigan to decree or order the payment of debts or damages to him. In Michigan, as in Massachusetts, under the probate system there prevailing, the doctrine for which we contend is distinctly recognized. This appears from the cases cited in our first brief (pp. 49-52). The rule is cogently stated by Mr. Justice Champlin in the opinion of the court in *Lafferty vs. The People's Savings Bank*, 76 Mich., 35, 50-51, where it is said:

*"Under our statutes, the assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testator, and until it is fully administered the probate court has jurisdiction in the matter of the proceedings, and in this case it was competent for the court to require the executrix to file a new bond, and to remove her for failure to comply with the order. * * **

*"It is true that executors take personal property of the testator as owners in their official capacity, for they have no principal behind them for whom to act. But they hold it in their official capacity as executors, and if they die, resign, or are removed, the assets undisposed of by them fall back into the estate of the deceased, and may be sued for and recovered by the administrator *de bonis non* with the will annexed."*

In support of these views, the court refers to Howell's Statutes, sec. 5861. This section now appears as section 9335 of the Compiled Laws of Michigan, 1897. For clearness of statement we print this section, as well as the three preceding sections with which it stands in association.

(9332:)

"When any sole executor or administrator shall die, without having fully administered the estate, the probate court may grant letters of administration with the will annexed, or otherwise, as the case may require, to some suitable person, to administer the goods and estate of the deceased, not already administered."

(9333:)

"If an administrator shall reside out of this State, or shall neglect, after due notice by the judge of probate, to render his account and settle the estate according to law, or to perform any decree of such court, or shall abscond or become insane, or otherwise unsuitable or incapable to discharge the trust, the probate court may, by an order therefor, remove such administrator, and every executor and administrator, upon his request, may be allowed to resign his trust, when it shall appear to the judge of probate proper to allow the same: *Provided*, Such executor or administrator shall, prior, and up to the time of his resignation, settle and adjust his accounts with the estate of which he may be executor or administrator: *Provided further*, That the sureties of such executor or administrator shall not be released from liability until such executor or administrator shall have fully settled and adjusted his accounts as aforesaid."

(9334:)

"When an administrator shall be removed, or his authority shall be extinguished, the remaining administrator, if any, may execute the trust; if there shall be no other, the court of probate may commit

administration of the estate not already administered to some suitable person, as in case of the death of a sole administrator."

(9335:)

"An administrator, appointed in the place of any former executor or administrator, for the purpose of administering the estate not already administered, shall have the same powers, and shall proceed in settling the estate in the same manner, as the former executor or administrator should have had or done; and may prosecute or defend any action commenced by or against the former executor or administrator, and may have execution on any judgment recovered in the name of such former executor or administrator."

In addition to the cases cited in our former brief, we call attention to a very recent decision of the Supreme Court of Michigan: *In re Choates' Estate*. This case was first reported 163 Mich., 288. An executor presented his final account in probate court. It was contested by his successor and administrator *de bonis non* with the will annexed. An appeal was taken to the circuit court, and in that court a judgment was entered charging the executor with the value of certain corporate shares owned by the deceased. This was upon the theory that the stock had been converted by the executor. The claim of conversion rested upon the fact that the executor became bankrupt and the stock certificate went into the possession of the trustee in bankruptcy, who refused to give it up. Later the executor obtained possession of the stock and brought it into court for the administrator *de bonis non*. Leave was given to correct the record, in order to show the present status of the stock.

The same case then came on to be heard before the court on the merits, and is reported *In re Choates' Estate*, 165 Mich., 420. It was held that the trustee in bankruptcy unlawfully retained the stock, but that, inasmuch as the ex-

ecutor had recovered possession of it, he should be credited with the appraised value thereof, in the absence of showing that he had neglected to sell it when a sale ought to have been made, or had attempted to convert it to his own use. From the report of this case it is apparent that it was the opinion of the court that if the executor had converted the shares to his own use he was properly chargeable in his accounts with the value thereof, and his successor, the administrator *de bonis non*, was entitled to recover judgment for such value. The judgment which actually passed in favor of the executor is based solely upon the ground that he was not guilty of unlawful neglect or conversion, but had produced and tendered to the administrator *de bonis non* the stock in question, and hence was entitled to be credited with the value thereof as set forth in the appraisal.

It will be noted that in the foregoing case the executor presented his final account for settlement in probate court, and that the account was contested in that court by his successor, who was an administrator *de bonis non* with the will annexed. There is no especial comment by the Michigan court upon this fact, and this for the reason that, under the settled practice of the probate courts of that State, the administrator *de bonis non* is the proper person to make such contest and to collect and receive the proceeds of any judgment or decree awarded against the executor.

(d) It is stated in the opinion of the circuit court of appeals that there is no statute of Michigan which authorizes an administrator *de bonis non* to maintain an action against a removed executor for waste, mismanagement of, or breach of duty, with respect to the estate, occurring during the latter's administration, and that, in the absence of such statute, the remedy against the executor is left where the common law placed it, in the hands of creditors, legatees, and distributees of the estate (Record, p. 37).

The circuit court of appeals arrives at this conclusion, however, because it is of opinion that, under the statutes of Mich-

igan, on removal of an executor the probate court has authority to grant letters of administraton only "*of the estate not already administered.*" Inasmuch as the court below was of opinion that estate converted to the use of an executor was estate administered, it deduced the conclusion that the administrator *de bonis non* had no authority to recover the assets so converted by the executor. From this it is apparent that the same fundamental error underlies all the conclusions reached by the circuit court of appeals respecting the jurisdiction or authority of probate courts in Michigan, it being assumed that assets *converted* are assets *administered*, whereas the express decisions of the Supreme Court of Michigan are to the contrary, as abundantly appears in *Lafferty vs. The People's Savings Bank*, 76 Mich., 35, 50; *Hall vs. Grovier*, 25 *id.*, 428, 432, 436, and the other cases cited in this and in our prior brief.

If it is true, as declared by the Michigan court in *Hall vs. Grovier*, *supra*, that, even though an asset were converted or misapplied by the executor, "*in contemplation of law it was still in his hands*," it is clear that no one save the successor administrator is entitled to or should be permitted to recover the same. Abundant authority, therefore, is given under sections 9428, 9429, 9430, 9435, of the Comp. Laws of Michigan, 1897, quoted above, in division III of this brief, especially when supplemented by the provisions of sections 9332, 9333, 9334, and 9335, Comp. Laws, printed in this division. By the express terms of section 9435 if the executor "*shall neglect to pay over the money he shall have in his hands*" (either actually or in contemplation of law) "*the damages sustained may be charged against the executor or administrator in his account, or he shall be liable therefor on his administration bond.*"

The very language of this section refutes the contention of Circuit Judge Sanborn, in his opinion (Record, p. 37), that in case of maladministration of an executor, the remedy, by plenary suit in another court upon his bond, is exclusive

of all others; for the statute clearly provides alternate remedies, viz:

First:

"The damages sustained may be charged against the executor or administrator in his account, or"

Second:

"He shall be liable therefor on his administration bond."

This is the view taken in the early case of *Storer vs. Storer*, 6 Mass., 390, 392, cited on pages 82-84 of our first brief, where suit was brought by an administrator *de bonis non* against the representatives of a former administrator declaring on a probate decree as on a judgment. It was said by Chief Justice Parsons:

"This action is maintainable by the plaintiff. When the decree passed he might have sued this action if the defendant refused to obey the decree.
* * *

"The judgment upon the administration bond is no bar to this action, being merely a cumulative remedy."

The more recent decisions in Massachusetts unequivocally affirm this decision and maintain this view. It is the established rule that no action at law can be maintained against the executor unless his account is settled in probate court, and, when it is so settled, an action at law on the probate court decree may be maintained in the name of the administrator *de bonis non*, or, in case of a minor under guardianship, may be brought in the name of the ward himself after arriving at full age.

In *Cobb vs. Kempton*, 154 Mass., 266, 269, Mr. Justice Knowlton says:

"It has never been decided in this Commonwealth, so far as we are aware, whether a guardian may be sued directly by his ward for the balance found due on the settlement of his account in the probate court after the expiration of his guardianship, or whether the remedy of the ward is exclusively on the probate bond. But we are of opinion that the decree of the probate court, and the refusal of the representatives of the guardian to pay over, in accordance with it, creates a debt in favor of the ward, for which he may sue in his own name. It has been so held in regard to administrators in analogous cases. *Storer vs. Storer*, 6 Mass., 390; *Drew vs. Gordon*, 13 Allen, 120, 122."

In *Thorndike vs. Hinkley*, 155 Mass., 263, 265, suit was brought by former wards against their guardian. The opinion in this case also was by Mr. Justice Knowlton, who said:

"It is established by the authorities, that, on such a liability, an action of *indebitatus assumpit* cannot be maintained before the guardian's accounts are settled in the probate court. It is important to the parties in such cases that all matters of account should first be considered and determined in the probate court, which is given jurisdiction for that purpose, and that neither of them should be liable to an action at common law while proceedings under the statute are open to the other. The defendant's accounts had not been settled, and the plaintiffs' remedy for this kind of default should have been sought in another way. * * * *If there had been a settlement of accounts, and a refusal to pay over the balance due, an action at law might be maintained.*"

Tyler vs. Wheeler, 160 Mass., 206, 210, maintains, in substance, that an administrator *de bonis non* with the will annexed of an estate cannot maintain an action at law against the administrator of the estate of the executor of the will, *in the absence of an account in the probate court, for assets which the executor appropriated and assumed to administer,*

and which cannot be traced or identified as a part of testator's estate.

This plainly indicates that if an account is taken in probate court, of assets converted by the executor, an action at law may be maintained on the probate court decree fixing the balance owing therefor.

For this very reason it is also held that a bill in equity will not lie. The remedy is to compel the executor to account in probate court, and then suit is brought, in the name of the administrator *de bonis non*, to recover the amount found due; and whether the suit is brought against the executor and the sureties on his bond, or against the executor alone, on a probate court decree, the *quantum* of recovery is fixed by that decree. Thus in *Amidown vs. Kinsey*, 144 Mass., 587, it is held that a bill in equity by the administrator *de bonis non* with the will annexed, alleging merely that the defendant, as executor, sold real estate under a power in the will, and *misappropriated the proceeds and refuses to account for them*, cannot be maintained as a bill for an account. It was held that the executor's account of these misappropriated assets must be settled in the probate court. Mr. Justice William Allen said:

"The statute requires that an executor's account of an estate in process of settlement in the probate court shall be rendered only in that court, and this court has jurisdiction of it only as the Supreme Court of Probate on Appeal."

(e) Other sections of the Michigan statute show that the circuit court of appeals was in error in its view that there is no statute in Michigan which authorizes an administrator *de bonis non* to maintain an action against a removed executor for waste or mismanagement of the estate or breach of duty with respect thereto. We call attention to sections 9317, 9318, 9319, and 9320 of the Comp. Laws of 1897:

(9317:)

"If an executor shall reside out of this State, or shall neglect, after due notice given by the judge of probate to render his account and settle the estate according to law, or to perform any decree of the court, or shall abscond or become insane, or otherwise incapable or unsuitable to discharge the trust, the probate court may remove such executor."

(9318:)

"When an executor shall die or be removed, or his authority shall be extinguished, the remaining executor, if there be any, may execute the trust; and if there shall be no other executor, administration, with the will annexed, may be granted of the estate not already administered."

(9319:)

"When all the executors appointed in any will shall not be authorized, according to the provisions of this chapter, to act as such, such as are authorized shall have the same authority to perform every act, and discharge every trust required and allowed by the will, and their acts shall be as valid and effectual for every purpose, as if all were authorized, and should act together; and administrators with the will annexed, shall have the same authority to perform every act, and discharge every trust, as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose."

(9320:)

"The executor of an executor shall not, as such, have any authority to administer the estate of the first testator; but, on the death of the only surviving executor of any will, administration of the estate of the first testator, not already administered, may be granted with the will annexed, to such person as the probate court may judge proper."

Under these sections of the statute the right to recover all assets of the estate, whether existing *in specie* or in the form of claims for damages for conversion, is clearly vested in the administrator *de bonis non* with the will annexed.

In *Perrin vs. Calhoun*, Circuit Judge, 49 Mich., 342, 345, Mr. Justice Campbell says:

"The fact of respondent's representation of a former executor does not under our statute entitle him to succeed his intestate in the trust. The statute is explicit that the executor of an executor does not *ex officio* occupy his place, and requires an administrator *de bonis non* to do so. Comp. L., §4375. It follows, therefore, that the *latter is entitled to have the property of the estate*, and to seek information concerning it in order to understand, as well as enforce his rights."

The section, 4375 of the Comp. Laws of 1871, to which the court refers is the same section above quoted as 9320 in the Comp. Laws of 1897. The word "administer" is here used in the sense which it bears in the Michigan law, and implies that no asset is administered until it is applied according to the laws of the State and the will of the testator. Such administration in that State of necessity involves three elements: First, the collection of the assets; second, the payment of the debts of the deceased and expenses of administration; third, the distribution of the net balance to those entitled thereto.

Ward vs. Tinkham, 65 Mich., 695, 698.

Lafferty vs. People's Savings Bank, 76 Mich., 35, 50.

(f) In our first brief we relied upon various decisions of the Supreme Court of Massachusetts as maintaining the doctrine that an administrator *de bonis non* may recover from the executor for assets of the estate converted by him. The decisions of that court do unquestionably so hold. This is not disputed by counsel for respondent. For convenience

we here refer to the cases cited in our original brief upon that point:

- Storer *vs.* Storer, 6 Mass., 390, 392.
- Wiggin *vs.* Swett, 6 Metc., 194.
- Buttrick, Admr., *vs.* King, Admr., 7 Metc., 23.
- Sewall *vs.* Patch, 132 Mass., 326.
- Minot *vs.* Norcross, 143 *id.*, 326.
- Barlow *vs.* Nelson, 157 *id.*, 395.
- Tallon *vs.* Tallon, 158 *id.*, 313.
- Brown *vs.* Doolittle, 151 *id.*, 595.
- Fay *vs.* Muzzey, 13 Gray, 53.
- Cobb *vs.* Muzzey, 13 Gray, 57.

In addition to those decisions we call attention to a recent case in Massachusetts, Rhines *vs.* Wentworth, 209 Mass., 585, which is instructive in this connection. There the testatrix gave to her brother, for life, the residue of her estate, appointed him executor, and then gave the same to the town of Weymouth for public purposes, in remainder, after the termination of the life estate. It was held that if the executor converted the estate's property to his own use, which, under the will, belonged to the town, by wrongfully transferring it to himself as legatee, an administrator *de bonis non* could recover it for the town's benefit.

We place especial reliance upon these Massachusetts decisions because the Michigan probate system is copied from that of Massachusetts. But counsel for respondent say (Brief, p. 38) that we are not quite accurate in this assertion. It is true they admit that Campau *vs.* Gillette, 1 Mich., 416, so decides, and likewise declares that the courts of Michigan adopted the construction put upon those laws by the courts of the State from which the laws were taken; but they assert that there have been changes since that decision in the statute law of Michigan, and they say that there is nothing to show that the probate laws of Michigan are now the same as those of Massachusetts. Attention is called to

a remark of Judge Campbell's (76 Mich., 66), that it is not true that the probate system of Michigan, as it now stands, was copied from Massachusetts to any general extent; but this was said with reference to the bond of a residuary legatee, it being insisted that the probate law on that particular subject was not adopted literally from Massachusetts (76 Mich., 78-79, 80-81). Furthermore, this remark of Judge Campbell's is made in a dissenting opinion by way of insistence that, upon the point there in issue, the Massachusetts decisions should not be followed. The majority of the court, however, recognized that the Michigan statutes followed very closely those of Massachusetts, and hence adopted the doctrines of the Massachusetts cases. *Lafferty vs. People's Savings Bank*, 76 Mich., 56, 57.

In the later case *State vs. Holmes*, 115 Mich., 456, 460, where a question of probate law was involved, the court decided the cause in accordance with a Massachusetts case to which its attention was called, saying:

"Our statute is taken from the Massachusetts law, and a construction had been placed upon it by the courts of that State before its adoption in Michigan."

This appropriation of the probate laws of Massachusetts by the legislature of Michigan is recognized by the compilers and revisers of the Michigan statutes. In a prefatory note to volume 1 of the compilation of 1857 (p. IV), Judge Cooleys say that the revision of 1846 was modeled after the statutes of New York and Massachusetts, from which States a large portion of the citizens of Michigan came; and in the best of all Michigan compilations (under the title XXV, "Settlement of Estates of Deceased Persons," 2 How. Stats., p. 1523), Judge Howell says:

"The Michigan probate laws were adopted from those of Massachusetts, and with them we have adopted the construction put upon them by the courts of that State."

That the particular statute with reference to the granting of administration upon the goods and chattels of testator not already administered upon is copied from Massachusetts there is no question. It now appears as Comp. Laws 1897, sec. 9320, *supra*. Identical in effect, but in slightly different phraseology, it is first found in Territorial Laws of Michigan, vol. 1, p. 353, adopted July 27, 1818. It there reads:

"And the executor of an executor shall not, in consequence thereof, become an executor of the first testator; but, in every such case, administration may be granted (if the circumstances of the estate require it) upon the goods and estate of the first testator, *unadministered upon*, with the will annexed, to such person or persons as the judge of probate may think fit. * * *

"The same being adopted from the laws of one of the original States; to wit, the State of Massachusetts, as far as necessary and suitable to the circumstances of the Territory of Michigan."

Eight years prior to the adoption of this statute the Supreme Court of Massachusetts had decided *Storer vs. Storer*, 6 Mass., 390, 392, to which reference has already been made, and which maintains not merely the right of the administrator *de bonis non* to sue the administrator of his predecessor in office for moneys converted, but the right to bring that action either on the probate court decree or on the administration bond. The law of Massachusetts, therefore, upon the subject of what are "administered" assets is, and since territorial days has been, the law of Michigan.

In order to show beyond a peradventure the origin of certain of the vital sections of the Michigan statutes, we call attention to the same as they appear in Revised Statutes of Michigan, 1838, the first revision or general enactment of statutory law made after the admission of Michigan to the Union in 1837, and make a comparison between those sections and the corresponding sections of the Massachusetts statutes. These comparisons are in addition to those men-

tioned in our first brief (pp. 82, 85). Our comparison is made with the Revised Statutes of Massachusetts of 1836.

Comparison of the Statutes of Michigan with Massachusetts.

Michigan.—Revised Statutes of 1838, p. 384:

“SEC. 3. The judge of probate for each county shall have power to take the probate of wills, and to grant administration of the estates of all persons deceased, who were at the time of their decease inhabitants of, or resident in the same county, and of all who shall die without the State, leaving any estate to be administered within such county; and also to appoint guardians to minors and others, in the cases prescribed by law.”

“SEC. 4. The judge of probate shall have jurisdiction of all matters relating to the settlement of the estates of such deceased persons, and of such minors and others under guardianship.”

Massachusetts.—Revised Statutes of 1836, secs. 5 and 6, chapter 83, p. 515:

“SEC. 5. The judge of probate for each county shall have power to take the probate of wills, and to grant administration of the estates of all persons deceased, who were, at the time of their decease, inhabitants of or resident in the same county, and of all who shall die without the State, leaving any estate to be administered within such county; and also to appoint guardians to minors and others, in the cases prescribed by law.”

“SEC. 6. He shall have jurisdiction of all matters relating to the settlement of the estates of such deceased persons, and of such minors and others under guardianship.”

The above statutes now appear in the laws of Michigan as Comp. Laws, 1897, sections 650, 651 (Respondent's Brief. 77-78).

Michigan.—Revised Statutes of 1838, p. 282, sec. 14:

“When a sole executor or administrator shall die without having fully administered the estate, the judge of probate shall grant letters of administration, with the will annexed or otherwise, as the case may require, to some suitable person, to administer the goods and estate of the deceased, not already administered: *Provided*, There be personal estate of the deceased, not administered, to the amount of twenty dollars, or debts to the like amount remaining due from the estate.”

Massachusetts.—Revised Statutes of 1836, p. 427, sec. 14:

“When any sole executor or administrator shall die without having fully administered the estate, the judge of probate shall grant letters of administration, with the will annexed, or otherwise, as the case may require, to some suitable person, to administer the goods and estate of the deceased, not already administered; *Provided*, There be personal estate of the deceased, not administered, to the amount of twenty dollars, or debts to the like amount remaining due from the estate.”

This section now appears in the Michigan law as Comp. Laws, 1897, sec. 9332 (Respondent's Brief, 79).

Michigan.—Revised Statutes of 1838, p. 282, sec. 15:

“When the administrator, residing out of this State, having been duly cited by the judge of probate, shall neglect to render his accounts and to settle the estate according to law, or when any administrator shall become insane, or otherwise incapable of discharging the trust or evidently unsuitable therefor, the judge of probate may remove him; and thereupon the other administrators, if there be any, may proceed in discharging the trust, as if the one so removed were dead; and if there be no other administrator to discharge the trust, the judge may commit administration of the estate, not already administered, to such

person as he shall think fit, in like manner as if the administrator so removed were dead."

Massachusetts.—Revised Statutes of 1836, p. 427, sec. 15:

"When an administrator, residing out of this State, having been duly cited by the judge of probate, shall neglect to render his accounts and to settle the estate according to law; or when any administrator shall become insane, or otherwise incapable of discharging the trust, or evidently unsuitable therefor, the judge of probate may remove him, and thereupon the other administrators, if there be any, may proceed in discharging the trust, as if the one so removed were dead; and if there be no other administrator to discharge the trust, the judge may commit administration of the estate, not already administered, to such person as he shall think fit, in like manner as if the administrator so removed were dead."

The above section now appears in the Michigan law as Comp. Laws, 1897, secs. 9317, 9318. See division IV of this brief.

Michigan.—Revised Stats. of 1838, sec. 6, p. 292:

"Every executor and administrator shall be chargeable in his account, with all goods, chattels, rights and credits of the deceased, which shall come to his hands, and which are by law to be administered, although they should not be included in the inventory; also with all the proceeds of real estate, sold for the payment of debts or legacies, and with all the interest, profit and income that shall in any way come to his hands, or be derived by him from both the personal and the real estate of the deceased."

Revised Statutes of Massachusetts, 1836, p. 436, sec. 5:

"Every executor and administrator shall be chargeable in his account, with all goods, chattels, rights, and credits of the deceased, which shall come to his hands, and which are by law to be administered, although they should not be included in the in-

ventory; also with all the proceeds of real estate, sold for the payment of debts or legacies, and with all the interest, profit and income that shall in any way come to his hands from the personal estate of the deceased."

The above section now appears as Comp. Laws of Mich., 1897, section 9428, and is found in division III of this brief.

Revised Statutes of Michigan, 1838, page 292:

"SEC. 2. Every executor and administrator shall account for the personal estate, at the value at which it shall be appraised, excepting as provided in the following sections.

"SEC. 3. No profit shall be made by executors or administrators by the increase, nor shall they sustain any loss by the decrease or destruction, without their fault, of any part of the estate; and if they shall sell any part of the personal estate for more than the appraised value, they shall account for the excess, and if they shall sell any for less than the appraised value, they shall be allowed for the loss, if it shall appear to the judge of probate that such sale was expedient, and for the interest of all concerned in the estate."

Revised Statutes of Massachusetts, 1836, page 436:

"SEC. 1. Every executor and administrator shall account for the personal estate at the value at which it shall be appraised, excepting as provided in the following sections.

"SEC. 2. No profit shall be made by executors or administrators by the increase, nor shall they sustain any less by the decrease, or destruction, without their fault, of any part of the estate; and if they shall sell any part of the personal estate for more than the appraised value, they shall account for the excess; and if they shall sell any for any less than the appraised value, they shall be allowed for the loss, if it shall appear to the judge of probate, that such sale was expedient, and for the interest of all concerned in the estate."

The above two sections are now found in Comp. Laws Mich., 1897, sections 9429, 9430, and are printed in division III of this brief.

Without trespassing further upon the indulgence of the court, it will be perceived, from the comparisons already made, that the statutes relative to the accounting by the executor in probate court, the fixing of his liability on such accounting, and the rights of the administrator *de bonis non* as successor to the executor were adopted from Massachusetts, and that the decisions of the Supreme Judicial Court of that Commonwealth correctly declare the law as it exists in Michigan.

(g) We also call attention to the provisions of the decree made by the probate court of Ottawa county on December 21, 1907, on which the instant suit is founded. From that decree it appears that all debts, expenses of administration, and specific and money legacies in the will of the deceased have been fully paid, save that it was not then determined whether the legacy given by clause sixth of the will (twelve thousand dollars in amount) is payable to the Presbyterian House or Lake Forest University (Record, pp. 11, 15), or whether the same should be retained by the residuary legatees.

It was therefore strictly in accordance with the practice of the probate courts of Michigan to direct the payment to the administrator *de bonis non* of the entire sum owing by the executor as the result of his accounting, and to allow the settlement of the administration account of the administrator *de bonis non*, and the disbursement of the funds coming to his hands, to await the further order of the court. This is the precise method which was approved by the Supreme Judicial Court of Massachusetts in *Storer vs. Storer*, 6 Mass., 390, 392, and which was there denominated "the only regular way in which a distribution could be decreed." So far as we are aware, this is the practice which has prevailed in

Massachusetts from that day to this, and in Michigan throughout its entire judicial history.

(h) The statutes of the various States relative to the administration of deceased persons vary so much in their terms that it is difficult to find cases exactly analogous to the instant cause. So far as we have found decisions depending upon statutes similar to those of Michigan the ruling of the court has been uniformly in accordance with our contention.

The Revised Statutes of Ohio, 1886, volume 2, section 6020, provide as follows:

"An administrator or executor appointed in the place of an executor or an administrator who has resigned, been removed, or whose letters have been revoked, or authority extinguished, shall be entitled to the possession of all the personal effects and assets of the estate unadministered, and may maintain a suit against the former executor or administrator and his sureties on administration bond, for the same and for all damages arising from the maladministration or omissions of the former executor or administrator."

Under this statute it is held by the Supreme Court of Ohio in *Slagle vs. Entrekin*, 44 Ohio St., 637, that the language of the statute, "personal effects and assets of the estate unadministered," includes the indebtedness of an administrator, who has resigned, to the estate on account of assets received and converted to his own use, as well as such "effects" and "assets" as remain *in specie*, and that the same may be recovered by his successor in an action upon the administration bond. In determining the bond it is said (p. 639):

"Under our statute, the assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testator."

This, as the court will recall, is the precise language of the Supreme Court of Michigan in *Lafferty vs. Peoples Savings Bank*, 76 Mich., 35, 50. It is further said by the Ohio court:

"That the amount found due from an administrator or executor to the estate on the settlement of his accounts in the probate court is, in the absence of fraud or collusion, binding not only upon him, but also upon his sureties, in an action upon the administration bond, * * *" and "that where upon the settlement of the accounts of an administrator or executor, who has resigned or been removed, the amount due from him to the estate has been ascertained and determined by the probate court, it is not error in the court, to order its payment to his successor in the administration of the estate. It is not an order of distribution, but a judgment in favor of the estate against him upon the settlement of his accounts for assets received and unadministered, and to which, under section 6020, Rev. St., the succeeding administrator is entitled."

In Kansas the language of the statute is as follows:

"An administrator appointed in the place of an executor or administrator who has resigned, or been removed, or whose letters have been revoked, shall be entitled to the possession of all the personal effects and assets of the estate unadministered; and may maintain an action against the former executor or administrator and his sureties on the administration bond, and for all damages arising from the mal-administration or omissions of the former executor or administrator."

This is the identical statute which exists in Ohio, and is closely analogous to the Michigan statute.

Under this Kansas statute the case of *American Surety Company vs. Piatt*, 72 Pac., 775, arose. It was claimed that there were no administered assets in the hands of the defendant; that such assets are confined to goods which remain *in specie*, to money received and kept by itself; that the same

do not include money derived from the sale of assets and mingled with the administrator's own money. It is said by the court:

"The common-law rule on which the Surety Company insists is not applicable under our statutes and the modern doctrine of administration. The mere change in the form of the assets made by an administrator does not bar his successor from acquiring possession of the assets and proceeding with the administration. As a general rule property of every kind and form in the hands of a former administrator, including the proceeds of property sold, pass to his successor, who may maintain an action to recover the same upon the official bond of the predecessor."

In Woerner on American Law of Administration, vol. 2, section 536, it is said:

"It will appear from the discussion of the relation between successive administrators of the same estate, that at common law an administrator *de bonis non* cannot compel accounting by his predecessor, or by the representatives of a deceased predecessor, for any property of the estate which may have been confused, converted, or wasted, because creditors, legatees, and next of kin have a direct claim against the deceased or former executor or administrator; and it will also appear that this doctrine, resting upon the theory that any conversion, waste, sale, or other change of condition of the assets of an estate, constitutes administration, is fast losing ground in the United States, as being inconsistent with the American theory that the wrongful conversion or waste of property does not amount to administration, but leaves the right to the converted goods or their equivalent still in the estate, so that it becomes the duty of the administrator *de bonis non* to recover the same, either in *specie*, or their equivalent in money. The difference in the extent to which courts and legislatures have departed from the common law in this respect has, of course, produced great divergence in

the decisions; not only is the law different in different States, but it is by no means well settled in all of the States themselves. Hence no general rule can be announced; but the tendency is unmistakably in the direction of recognizing the duty of administrators *de bonis non* to continue the administration, and to complete it by doing everything which their predecessors have left undone."

V.

The notice given to Edward P. Ferry was valid and effectual to authorize the decree actually rendered in the Probate Court of Ottawa County.

In the opinion of the circuit court of appeals it is said that no summons or notice was ever served on the defendant warning him that any claim that the trust company, as administrator *de bonis non* or otherwise, was entitled to recover damages for the maladministration of the estate of his father would be considered or adjudicated by the probate court in Michigan; no cause of action in behalf of any such administrator was pleaded or suggested in the petition to which his attention was called; the findings and decree of the probate court are that the defendant's indebtedness therefor is to the estate of the father, while the order of the probate court that this debt be paid to the trust company rests upon no cause of action pleaded, and hence it was beyond the jurisdiction of that court and void (Record, p. 38).

The argument of respondent's counsel upon this head is found in their brief, division II (pp. 20-27) and division V (pp. 40-44).

This contention is based upon the fundamental error to which we have already adverted. It assumes that the probate court had no power or authority upon an accounting, and as a part of such accounting, to render a decree charging Edward P. Ferry for assets converted by him or to direct

payment to an administrator *de bonis non*, but that, when he was called upon to account, it was a sufficient reply that he had "*administered*" the assets by *converting them to his own use*.

It will be noted, however, that the petition filed by the residuary legatees in probate court prayed not only for the removal of Edward P. Ferry, as executor of the last will and testament of his father, William M. Ferry, deceased, but also—

"That he or his representatives be ordered to account forthwith to said court for the residue of said estate of said deceased which was unadministered, for the appointment of The Michigan Trust Company, plaintiff herein, or some other suitable person as administrator *de bonis non* with the will annexed of said estate, and that said probate court make such other and further order in the premises as to it might seem proper" (Record, 2-3).

This is the averment of the petition filed in the Federal court in Utah. Giving to these words the meaning which, under the decisions of the Supreme Court of Michigan, they clearly bear, Edward P. Ferry was called upon to come into court to account for all assets of his father's estate which had come to his hands, including assets converted by him. The language employed called for a fixing or determination of the balance due from him and for the payment of that balance to The Michigan Trust Company or such other suitable person who might be appointed administrator *de bonis non* with the will annexed of said estate. This is clear because the fixing of the net balance due and the payment thereof are, as we have seen, essential parts of an executor's accounting in Michigan.

Notice of this order was given to Edward P. Ferry, both by publication in manner and for the period required by the statutes of Michigan and the order of the probate court, and by personal service on Edward P. Ferry and upon his

guardians, W. Mont Ferry and Edward S. Ferry, at Salt Lake City, Utah (Record, p. 3).

Thereafter the executor appeared in the case by guardian *ad litem* and next friend, filed his answer and cross-petition, and, after the taking of voluminous proofs, the court required the executor to render a more detailed statement of his account. Thereupon the executor insisted that the powers of attorney, written authorizations, and mortgages, deeds, and other conveyances executed by him constituted his final account as executor and that he should not be required to render any other or further account (Record, p. 9). Pursuant to leave of court further proofs were taken, and after the same were concluded, and as preliminary to a final order on the merits, by like leave of the court, the petitioners for accounting made and submitted to the court a statement charging, surcharging, and falsifying the alleged final account of the executor already before the court; which statement presented the proposed amendments and objections of petitioners to the alleged final account of the executor with the estate and stated the account as the petitioners claimed the same to be (Record, p. 9). Before entry of the decretal order of December 30, 1907, passing upon the final account of the executor and determining the balance due, an order of the probate court, made on March 6, 1907, was duly published as therein directed, giving all persons interested in the estate notice of the hearing upon the final account, and personal notice was also given to all persons interested of the examination of such final account of the executor (Record, p. 10).

The foregoing notices were given in accordance with the statutes of Michigan, and the following consequences ensued:

(a) The probate court had power to proceed and state the account, and determine how much was due from the executor.

That this is true is shown by the various cases cited in division III of this brief.

(b) Inasmuch as the probate court has jurisdiction to state the account of the executor, it logically follows that the executor is bound by the account so stated, and an action may be maintained on the probate court decree to recover the net balance found due from the executor.

This is shown in divisions III and IV of this brief.

(c) The decree of the probate court, being rendered pursuant to statutory notice to the executor to account, is valid and binding, whether that notice is served personally, or is given by publication as authorized by the Michigan statutes.

Spencer *vs.* Houghton, 68 Cal., 82. It is here held that in a proceeding in probate court to compel an accounting by a guardian who has left the State, so that personal service on him cannot be had, the citation must be served by publication, in the same manner as a summons in a civil action; and that in the absence of such service neither a guardian nor his sureties are bound by the decree rendered on the accounting. The court says (p. 88):

"The guardian thus appointed is bound to settle his accounts whenever directed by the probate court. The notice to settle issued by the court must, of course, be in accordance with that prescribed by statute. The guardian receives his appointment, under these provisions of law, and as the law prescribes a service of such notice by a publication of the citation as of a summons in an ordinary civil action, we are of opinion that the contention cannot be held sound that the substituted service by publication of the citation to a guardian so appointed who has left the State without settling his accounts, is not such notice as is legal and binding on him. *A person appointed guardian under our statutes may be regarded as having consented in advance that upon leaving the State service of notice may be made upon him by publication.*"

It was the view of the court that this is in consonance with the rule laid down in *Vallee vs. Dumergue*, 4 Exch. 290, in these words (p. 808):

"It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them."

This rule is approved in the leading case of *Pennoyer vs. Neff*, 95 U. S., 714, 735.

Upon the question of the sufficiency of the notice in the instant cause *Trumpler vs. Cotton*, 109 Cal., 205, is in point. There a guardian absconded from California and took up his residence in Victoria, B. C. A petition was filed in probate court—

"setting forth the facts and showing that the said guardian had failed to file his final account, and praying a citation to said guardian requiring him to appear and render his account, etc."

"Thereupon a citation in due form was ordered by said court requiring said guardian to appear and file his account on June 27, 1892; and, upon an affidavit showing that said guardian was a non-resident of the State of California, and a resident of Victoria, British Columbia, Dominion of Canada, etc., an order was made in due form for publication of said order requiring said guardian to appear and file his account. The order was duly published, and a copy duly deposited in the mail, directed to said guardian at Victoria, etc."

The guardian failed to appear; it was referred to a referee to prepare an account and the account was prepared and settled by the court, and the balance due from the guardian to his ward was determined. The question arose as to the validity of this decree. It was objected that there was no jurisdiction in the court of probate to settle the account and

that the sole jurisdiction was in equity. But the court said (pp. 254-255) :

"The affidavit for publication was such as is required in cases of publication of summons in a civil action, and must be held sufficient. The court having thus by *substitute service obtained jurisdiction of the person of the guardian, and possessing, under the statute, jurisdiction of the subject-matter of the settlement of his account, and the guardian being without the jurisdiction of the court, and not amenable to process of attachment, and having failed to file his account, it was within the province of the court to (as was said in Graff *vs.* Mesnier, 52 Cal., 657) cause 'the account to be made up, audited, and settled, upon such evidence as should be adduced on behalf of the ward.'*

"Where jurisdiction is conferred upon a court by the constitution or a statute, all the means to carry it into effect are also given, and, if the course of proceedings is not specifically designated by the Code, any suitable mode may be adopted which may appear most conformable to the Code. (Code Civ. Proc., sec. 187.)

"*Spencer vs. Houghton*, 68 Cal., 82, is to the point that a guardian is bound to settle his accounts whenever directed by the probate court, and that the guardian who receives his appointment under the law which prescribes that notice may be served by publication is to be regarded as assenting in advance that upon leaving the State service may be made upon him by publication."

In *Moore vs. Fields*, 42 Pa. St., 467, two brothers of one who died domiciled in New York took out letters of administration there, gave bond, received the estate of decedent, and afterwards removed to Pennsylvania without settling an account. Proceedings were had before the surrogate in New York, as a result of which the administrators were dismissed from office and the public administrator was appointed to administer the estate. Then, at the instance of

the public administrator, the superseded administrators were summoned to appear and settle their accounts in the surrogate court of New York and service of process was made upon them in Philadelphia, and not within the State of New York. The surrogate stated an account showing a balance due from the administrator and ordered that the same be paid to the public administrator of said state. Suit was then brought in Pennsylvania by the public administrator against the removed administrators. The action was in debt, founded upon the record of the surrogate's court of New York, an exemplified copy of which was filed by the plaintiff. The court, speaking through Mr. Justice Woodward, said (pp. 472-473) :

"Under the Revised Statutes of New York the surrogate had jurisdiction of the parties and of the subject matter, and his proceedings appear to have been in due course of law. His decree, unappealed from, is conclusive between the parties. Conclusive of what? Conclusive of Fields' right to receive from the defendants so much money, and of their liability to pay him. It is of no moment that he is called administrator in the surrogate's record. Had he been called trustee for creditors and heirs, or had no title whatever been given him, his right to recover in our courts upon such a record would have been the same as it is now. A judicial decree that a man receive a certain sum of money from defendants, who were duly warned and fairly subject to the jurisdiction, entitles him to sue for it in a Pennsylvania court, with or without his official titles. That money was never subject to administration in Pennsylvania. It was an administered fund before it was brought here. It was held by the administrators in trust for the creditors and heirs of the decedent, in whom the beneficial interest had already vested; and when the court to which these trustees had submitted themselves decreed a payment over to another trustee, it was their duty to obey, as they had solemnly promised to do. * * *

"There is one other point raised by the affidavits. They state that the only service of the surrogate's

process was made upon them in Philadelphia, and not within the State of New York. * * * The regular service of such process is of prime moment, for it is in virtue of that that the tribunal ordinarily gains jurisdiction; but in the case of these defendants the surrogate had jurisdiction from the time he granted the letters of administration, and it was their legal duty to appear and settle their accounts without any summons whatever from the surrogate. The fact that his notice reached them in Pennsylvania was not, in our judgment, a circumstance of any importance."

The cases above cited are authority to the point that, under such statute as that of Michigan, a service by publication or personally in a foreign jurisdiction of an order of probate court requiring an executor to appear and settle his accounts is sufficient service of process to admit the rendition of judgment or decree fixing the balance due from the executor upon accounting, and that suit can be maintained against the executor in a foreign jurisdiction upon such order or decree.

In discussing this subject it is said by Circuit Judge Sanborn (Record, p. 41) that the court has considered various adjudicated cases which adopt a view contrary to that of the court below; but it is said that the question presented does not appear to have been carefully considered and authoritatively ruled under statutes and facts similar to those in the case in hand. One case so cited is a Massachusetts case, *Storer vs. Freeman*, 6 Mass. (evidently meaning *Storer vs. Storer*, 6 Mass., 390). The court below grievously erred in believing that the Michigan statute was not similar to that of Massachusetts, for, as we have already seen, the Michigan probate statutes were adopted from Massachusetts.

There is, therefore, no foundation for the contention that the probate court lost jurisdiction over Edward P. Ferry and had no authority to render a decree against him. This same contention was made in behalf of this executor in *Stevens vs. Ottawa Probate Judge*, 156 Mich., 526, but it did not

prevail with a court intimately familiar with the statutory system of probate law which has existed in Michigan since the formation of that State. Rev. William M. Ferry was a resident and inhabitant of Ottawa county; he died leaving a last will and testament, and also leaving estate, real and personal, situate in that county to be administered. Edward P. Ferry was named executor in the will. He qualified, submitted to the jurisdiction of the court, assumed to fulfill the trust, and for some years, it is conceded, continued in the discharge of the duties of that trust, accounting in part, but only in part, for the assets coming to his hands. The Probate Court of Ottawa County had, therefore, jurisdiction over both the subject-matter and the person of the executor.

It will be noted that in the case of *Moore vs. Fields* the court says that the surrogate had jurisdiction from the time he granted letters of administration, and that it was the legal duty of the administrators to appear and settle their accounts without any summons from the surrogate. The court, therefore, holds that the fact that the notice reached the administrators in Pennsylvania is a circumstance of no importance. By express statute this same duty to appear and render an account rested upon this executor in Michigan. There are two sections of the statute which bear upon this subject. They are the following:

"SECTION 9436. Every executor or administrator shall render his account of his administration within one year from the time of his receiving letters testamentary or of administration, unless the court shall give permission to delay, in consideration that the time for selling the estate and paying the debts shall be extended; and he shall render such further accounts of his administration from time to time, as shall be required by the court, until the estate shall be wholly settled; and he may be examined on oath upon any matter relating to his account."

"SECTION 9345. It shall be the duty of the judge of probate of any county in this State to notify and require all persons appointed executor or adminis-

trator of any estate, or guardian of any minor child, or of any person under guardianship, within his county, to appear at his office within one year from the date of their appointment as such administrator, executor or guardian, and at least once each year thereafter during the continuance of the administration or guardianship, and at such other times as he may direct, and render unto him an accurate account of all moneys and other property in his hands as such executor, administrator or guardian, and the proceeds and expenditures thereof."

The history of the above sections of the statute is well known in Michigan. There originally stood in the statute law of that State section 9436, which makes it the duty of the executor to account. The section which now stands as compiler's section 9845 was enacted in 1873, for the purpose of making it the express duty of the judge of probate to require all executors or administrators to account.

(d) It is insisted by counsel (Respondent's Brief, 20, 21) that the decree of the probate court was in excess of the relief demanded in the process and pleadings and therefore void as in violation of due process of law. We are familiar with the general rule as stated in *Windsor vs. McVeigh*, 93 U. S., 274, 281, that a court cannot transcend the power conferred by the law; that if the action be upon a money demand, the court has no power to pass judgment of imprisonment in the penitentiary; that if it be a liberal or personal tort, the court cannot order specific performance of contract; that if the action be for possession of real property, the court is powerless to admit in the case the probate of a will.

We insist, however, that this doctrine has not the slightest application to the instant cause. If reference be had to the Michigan law, as interpreted by the courts of that State, Edward P. Ferry had notice of every claim adjudicated in the probate court decree. By the petition filed in probate court and the notice given pursuant thereto, he was called upon to account as executor. This, under the Michigan law,

subsequently implied that he was called upon to account for assets converted by him, as well as those which remained in his hands *in specie*; that it was intended, as stated in Hall v. Criveler, 25 Mich., 428, 486, to

"determine the rights of the estate against him and his rights against the estate."

Furthermore, as shown by the cases already cited, an accounting implied payment of the balance owing by the executor, and it also implied that that balance should be paid to the person entitled thereto. That person in Michigan is the administrator *de bonis non*, and the petition and notice informed Harry that it was proposed to present his removal as executor and the unpayment of The Michigan Trust Company as such administrator *de bonis non* with the will annexed, as well as to apply for "such other and further order" as might be proper (Record, pp. 2-3).

It cannot, therefore, justly be said that Edward P. Foy was not notified that the relief granted would be sought. Indeed, it was because the accounting in Michigan necessarily involved the determination of the balance due, that the executor, through his attorneys and guardians, contested for four and one-half years the accounting suit in the probate court of Ottawa County.

Our contention is supported by:

Standard Oil Co. *vs.* Missouri, 224 U. S., 270, 287.

Twining *vs.* New Jersey, 211 *id.*, 78, 111-112.

In Standard Oil Co. *vs.* Missouri, 224 U. S., 278, 287, it is said:

"The Fourteenth Amendment guarantees that the defendant shall be given that character of notice and opportunity to be heard which is essential to due process of law. When that has been done the requirements of the Constitution are met, and it is not for this court to determine whether there has been an erroneous construction of statute or common law.

Town Central Railway *vs.* Town, 160 U. S., 380; West *vs.* Louisiana, 104 U. S., 261. The matter was submitted up by Justice Moody in *Twining *vs.* New Jersey*, 211 U. S., 78, 110, where, citing many authorities, he said:

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

"There is nothing in the present record which takes the case out of that principle. This was not like a suit on a note resulting in a sentence to the penitentiary, nor does it resemble any of the extreme illustrations given in *Windsor *vs.* McVeigh*, 93 U. S., 274, 282, in which, after a trial, the judgment of a court having jurisdiction might be invalidated because the relief so far exceeded the issue heard as, in effect, to deprive the defendant of the benefit of his constitutional right to notice. No such question is presented in the present case, for the plaintiffs in error were bound to know that, under the laws of Missouri, the court, on proof of the charge contained in the information, might impose a fine. * * *

And so likewise in the case at bar the executor was bound to know that when he was called to account in probate court it was competent for that court to fix the balance due and direct its payment to the administrator *de bonis non*.

In *Twining *vs.* New Jersey*, 211 U. S., 78, 111-112, Mr. Justice Moody refers to *Louisville & Nashville Railway Company *vs.* Schmidt*, 177 U. S., 230, 236, where it is said:

"It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control more forms of procedure in State courts or regulate

practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

And, likewise, attention is called to *Hooker vs. Los Angeles*, 188 U. S., 314, 318, where it is said:

"The Fourteenth Amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained if the method adopted gives reasonable notice and affords a fair opportunity to be heard."

In the instant cause reasonable notice was given and there was certainly fair opportunity to be heard, because the litigation was closely contested in the State courts for a series of years.

(e) It is urged by counsel for respondent (Brief, pp. 40-44) that The Michigan Trust Company was not a party to the accounting suit, and that it can, therefore, have no right of action on the decree.

This is a contention that the probate court had not the power to grant in one decree all the relief embraced therein, but should have split the same into two or more parts. This is the identical issue determined in *Stevens vs. Ottawa Probate Judge*, 156 Mich., 526. It would doubtless have been competent for the court to remove the executor, appoint an administrator *de bonis non*, and determine the obligation of the executor to account, without further order or decree. But, under the decision of the Michigan Supreme Court, the probate court was not bound to do merely this; but it was entirely proper for that court to fix the amount due and direct its payment. The questions presented in division V of respondent's brief (pp. 40-44) are, therefore, adjudicated in the Supreme Court of Michigan against the contention of respondent.

Furthermore, cases cited in division IV of this brief are express to the point that it is proper practice to direct the payment to the administrator *de bonis non*. It is idle to say that the administrator *de bonis non* or the residuary legatees are not bound by the decree. All the residuary legatees were before the court. The Michigan Trust Company was already before the court as special administrator of William M. Ferry, and as administrator with the will annexed of Col. William Montague Ferry, and as administrator of the estate of Mary L. F. Eastman (Record, p. 9; Respondent's brief, p. 43). The petition for accounting prayed its appointment as administrator *de bonis non*. It could not enter upon its duties as administrator *de bonis non* until Edward P. Ferry was removed from his office as executor, and the same decree which removed the executor and appointed his successor properly directed the delivery to that successor of moneys then in the hands of the executor or which in contemplation of law was then in his hands.

VI.

The decree finds an indebtedness to the estate, but directs its payment to the administrator *de bonis non* with the will annexed.

In respondent's brief (p. 44) it is urged that the decree was rendered in favor of the estate of William M. Ferry, deceased, and is void for that reason. The decree does find an indebtedness owing by the executor to the estate, but it directs its payment to the administrator *de bonis non* with the will annexed (Record, pp. 14-15).

The account, under the Michigan practice, is that of the executor with the estate.

As said in *Hall vs. Grovier*, 25 Mich., 428, 436:

"The end to be accomplished is to judicially liquidate and settle the affairs of his trust, and determine *the rights of the estate as against him, and his rights as against the estate, * * **"

But, as above noted, the decree does not direct payment to the estate. The decree of probate court directed the payment to be made to the administrator *de bonis non*, and, as we have already seen, this accorded with the accustomed practice of Michigan courts.

VII.

The decree of the Michigan Probate Court is a final decree.

In respondent's brief (pp. 45-48) it is insisted that the decree of the probate court lacks the elements of a final decree. It is said that this is because it does not deny to Edward P. Ferry the right to participate in the estate of Thomas W. Ferry.

The payment of the full sum of \$915,355.08 was directed to be made to The Michigan Trust Company, administrator *de bonis non* with the will annexed of the estate of William M. Ferry (Record, pp. 14-15). Under the Michigan practice the administrator *de bonis non*, after collecting the moneys due on the decree, will settle its account in probate court. Presumably the administrator of Thomas W. Ferry will be entitled to some portion of the moneys thus distributed. The decree as framed (Record, p. 14) declares in substance that the rights of Edward P. Ferry in the estate of his brother Thomas are not concluded by the decree. This saving of Edward P. Ferry's right to participate in the distribution of some estate *other than the one in hand* could, in no aspect, affect the finality of the decree. The decree unquestionably makes final disposition of all rights of the estate of William M. Ferry against Edward P. Ferry and

of all rights of Edward P. Ferry against the estate. It does not lack finality because it does not at the same time dispose of all rights in some other estate not then before the court. It is, unquestionably, final under the decisions of the Supreme Court of Michigan and the other cases to which attention is called in our first brief (pp. 14-23).

The case of *Storer vs. Storer*, cited in our first brief (pp. 83-84), expressly decides that the regular practice is to direct payment to the administrator *de bonis non*, and thereupon that administrator should make settlement of his administration account. The decree directing payment to the administrator *de bonis non* is so far final that an action at law lies against the administrator upon that decree.

VIII.

The accounting suit fixes the liability of Edward P. Ferry, the executor, not the liability of his guardians, and there is no room for the application of the doctrine of privity between guardians.

It is argued by respondent (Brief, pp. 49-52) that the fact that the decree was rendered against Edward P. Ferry in a proceeding in which he was represented by a guardian *ad litem* in Michigan makes the decree of no binding force against his person and property under general guardianship in Utah. The case is argued as if it were controlled by the supposed analogy existing between such case and that of administrators in different jurisdictions, between whom there is no privity. But there is no such analogy, and no case is cited which supports the position taken by counsel.

The fact that Edward P. Ferry is now mentally incompetent does not bar suit in accounting against him for acts done prior to adjudication of incompetence. An insane or mentally incompetent person is sued just like any person in full possession of his faculties. The suit is not brought

against the guardian, but against the insane person himself. Upon its being brought to the attention of the court that the person sued is insane, the court will see that some one is appointed guardian *ad litem* to make defense in his behalf. The defense, however, is that of the insane person, not of the guardian. *Ingersoll vs. Harrison*, 48 Mich., 284; *Taylor vs. Lovering*, 171 Mass., 303; *Hicks vs. Chapman*, 10 Allen, 463; *Scott vs. Winningham*, 79 Ga., 492; *Raymond vs. Sawyer*, 37 Me., 406; *Coombs vs. Janvier*, 31 N. J. Law, 240; *Van Horn vs. Hann*, 39 N. J. Law, 207.

These authorities establish that guardians have no legal title to the property which is placed under their care. In this respect they differ from executors, administrators, or trustees, who are invested with such legal title. The guardian has but a naked power not coupled with an interest. As declared by the Supreme Court of Massachusetts in *Hicks vs. Chapman, supra*:

"The debts of the ward remain his, so that, though he has no power to pay them, yet *he*, and *not the guardians*, must be sued upon them. *Brown vs. Chase*, 4 Mass., 436. If they defend actions brought against him, *they must defend in his name and not in their own*. *If they bring actions, it must be in his name and not in their own, and the judgment is in his name*."

It is supposed by counsel (Brief, division IX, pp. 53-54) to be an anomalous thing that a guardian should settle the account of his ward in probate court. But the statute of Michigan, after providing for the appointment of a guardian for incompetents, makes express provision for such case.

Comp. Laws 1897, § 8718, reads:

"Every such guardian shall also settle all accounts of the ward, and demand, sue for and receive all debts due to him, or may, with the approbation of the judge of probate, compound for the same, and give a discharge to the debtor, on receiving a fair and just dividend of his estate and effects; and he

shall appear for and represent his ward, in all legal suits and proceedings, unless where another person is appointed for that purpose as guardian or next friend."

Under this statute it is clearly within the power of the court to allow suit to be defended by the general guardians of Edward P. Ferry (if there are any competent to act) or to appoint some other person as guardian *ad litem* to undertake the defense of that suit, just as the court prefers.

While counsel urge (Brief, pp. 53-54) that it is without warrant to appoint a guardian *ad litem* for an incompetent executor, it is thus perceived that the Michigan statute expressly contemplates such a case. If an executor becomes incompetent and it is desired to call him to account, how can it be done if there is no power to appoint either guardian or guardian *ad litem* to represent him? The laws of Michigan do not give immunity to one who converts to his own use properties entrusted to his care merely because he subsequently becomes a mental incompetent, but, as seen from the authorities above cited, he is to be sued in like manner as a person in possession of his faculties.

IX.

The remedy is not in equity, but in the probate court.

It is argued by counsel for respondent (Brief, pp. 55-64) that the remedy is in equity and that no jurisdiction exists in the probate court to settle the executor's accounts. What we have already said suffices to show that the probate court had jurisdiction over the subject-matter of William M. Ferry's estate, and that it likewise acquired jurisdiction over the person of Edward P. Ferry. In division V, subdivision (c) of this brief we have considered this subject and it has there appeared that there is no foundation for the contention that the probate court lost its jurisdiction over Edward

P. Ferry. But we desire to submit a few additional considerations to show that it was the only court possessed of that jurisdiction.

The circuit court of appeals seems to have been of opinion that the remedy was in probate court as to all unadministered assets (see excerpt from opinion Circuit Judge Sanborn on pages 56-57 respondent's brief), but adopted what we believe this court must find to be the erroneous view that it is the law of Michigan that the misappropriation of assets is the administration thereof.

It would be a sorry situation in which *cestuis que trust* would find themselves if, as contended by counsel (Brief, p. 58), the sole remedy was to remove the executor from office and then allow him to escape obligation to settle his accounts in the court of his appointment by crossing the State line.

Reference is had to *Perrin vs. Probate Judge*, 49 Mich., 342, and it is said (Brief, p. 60) that, while the remedy of discovery was granted to an administrator *de bonis non* in probate court, it was suggested that the aid of equity might be necessary; but this is because partnership interests were involved.

Counsel refer (Brief, pp. 61-63) to cases in other States which maintain that there is no power in the court of probate to call to account the administrator of a deceased executor or guardian; but it suffices to reply that the law of Michigan is settled to the contrary in *Tudhope vs. Potts*, 91 Mich., 490.

(d) Not only had the probate court for the county of Ottawa authority to determine the amount due by Edward P. Ferry as executor of his fathers' will, but it was the only court possessed of that jurisdiction. When the Ferry litigation was before the Supreme Court of Michigan in *Stevens vs. Ottawa Probate Judge*, 156 Mich., 526, we argued in that court that Edward P. Ferry, as executor, was exclusively

bound to account for all the assets which he received under and by virtue of his administration to the proper tribunals of the Government under which he derived his authority, that is to say, the courts of the State of Michigan; and that the tribunals of another State have no right to interfere with, nor control the application of, those assets, according to the *lex loci*, and that the executor is not liable to be sued in that capacity in the courts of such other States.

In support of that proposition we cited—

Vaughan vs. Northup, 15 Pet., 1.

Lawrence vs. Nelson, 143 U. S., 215, 222.

Lewis vs. Parrish, 115 Fed., 285.

Norton vs. Palmer, 7 *Cush.*, 523.

Fay vs. Haven, 3 *Mete.*, 109, 116.

Low vs. Bartlett, 8 *Allen*, 259, 263.

Selectmen of Boston vs. Boylston, 2 *Mass.*, 384, 393.

Cocks vs. Varney, 42 *N. J. Eq.*, 514.

Story on Conflict of Laws, section 514*b* (7th ed.).

The leading case on this subject is *Vaughan vs. Northup*, decided in this court. In that case the original administration was taken out in Kentucky and moneys belonging to the estate of decedent were received by the administrator in the District of Columbia, and a bill in equity was filed in the Circuit Court of the District of Columbia to compel the administrator to account, the complainants stating that they were the next of kin and distributees of the decedent. The opinion is by Mr. Justice Story, who says (15 Pet., 5-6):

"Under these circumstances the question is broadly presented whether an administrator, appointed and deriving his authority from another State, is liable to be sued here, in his official character, for assets lawfully received by him under and in virtue of his original letters of administration. We are of opinion both upon principle and authority, that he is not. Every grant of administration is strictly confined in its authority and operation to the limits of the terri-

tory of the government which grants it; and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other State; and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the administrator is *exclusively bound to account* for all of the assets which he receives under and in virtue of his administration *to the proper tribunals of the government from which he derives his authority*; and the tribunals of other States have no right to interfere with or to control the application of those assets, according to the *law*."

The Supreme Court of Michigan so far upheld these views as to adjudge that the probate court of Ottawa county was invested with full jurisdiction to require Edward P. Ferry to account as executor, and also in the same decree to fix and determine the amount owing by him, and from the authorities above cited it is evident that the accounting of the executor was properly had *in Michigan* and could be had *only in that State*. That is the State in which letters testamentary were issued and to the probate court of which Edward P. Ferry bound himself to account, and to the jurisdiction of which he submitted himself. It is the State in which the administration was actually pending. It being established that the executor is not suable in Utah, or other foreign State, for his acts or omissions in the Michigan administration, certain consequences logically follow. Is it within his power to escape all obligation to account in Michigan by going beyond the State line? If so, a dishonest executor has only to convert the assets of the estate and go beyond the borders of the State and the beneficiaries are without remedy. It is intolerable to think that this executor—having received the assets of his father's estate and con-

verted the same to his own use—can escape obligation to account therefor in any forum. It is clear that he must account in the probate court of Michigan, which is the court, and the only court, having jurisdiction over both parties and subject-matter.

X.

The executor's account was also adjudicated upon the cross-petition of the executor appearing by his guardian *ad litem* and next friend.

Reference is made in the opinion of Circuit Judge Sanborn to the cross-petition filed by Edward P. Ferry in the probate court of Ottawa county by his guardian *ad litem* and next friend, and it is asserted in effect that the appearance of the guardian *ad litem* and next friend and the filing of the cross-petition are of no importance, because the probate court had no jurisdiction over the claim involved in the suit. This for the reason, as asserted, that there was no such service of process in the original accounting suit as gave the probate court jurisdiction of the claim against the person and estate of the executor founded on the alleged *devastavit* (Record, p. 42).

The affirmative relief prayed in the cross-petition was that the probate court by order declare and determine that the estate of William M. Ferry had been fully administered and closed, that said executor be discharged and his bond as such be cancelled, and that said executor have such other and further relief as to the court might seem meet (Record, p. 4).

This cross-petition clearly presented for the determination of the court the state of the executor's accounts. It succinctly raised the issue whether, on the one hand, the executor had fully administered the estate, owed nothing, and was entitled to be discharged from his trust; or whether, on

the other hand, he had but partially performed his trust, was indebted to the estate on balance of account, and should be denied a discharge until that balance was liquidated.

It is clear that the answer and cross-petition of the executor were intended as a statement of the executor's account; for, except on the theory that he had accounted for all properties of the estate coming to his hands, the executor could not maintain his cross-petition for a discharge from his trust.

There was nothing in the case to indicate that Edward P. Ferry had ceased to be liable as executor and become liable as trustee. But, if it were competent for him to exchange the character of executor for that of trustee, he could not do so until he accounted as executor and credited himself in his accounts with the specific moneys and properties turned over to himself as trustee.

Buss vs. Buss Estate, 75 Mich., 163.

Cranson vs. Wilsey, 71 *id.*, 356.

Fingleton vs. Kent Circuit Judge, 116 *id.*, 211.

In re Sanborn's Estate, 109 *id.*, 191.

In re Sweetser Estate, 109 *id.*, 196.

Nolan vs. Rice's Estate, 138 *id.*, 146.

Under these authorities, unless the answer and cross-petition and the other documents filed by the executor as his final account could be treated as such, there was nothing before the court which could be claimed to be a basis for the relief which he asked. That the judge of probate understood that the executor was before the court asking, by way of affirmative relief, for the approval of his final account, is shown by the final decree of the probate court of date December 31, 1907, which contains the following (Record, p. 9):

"Thereupon said executor contended before this court that the powers of attorney, written authorizations, mortgages, deeds, and other conveyances, alleged to have been made in pursuance of such powers

of attorney and authorizations, constitute and are a full, complete, and final account of said executor in this court, as the representative of said estate, and that said executor should not be required to render any other or further account in this court; and the said executor neglected and refused to render any other or further account than as herein specified, insisting upon the approval of his said alleged final account and that this court make an order declaring that the estate of said deceased has been fully administered and closed, and discharging said Edward P. Ferry as executor, and cancelling the said executor's bond, and releasing and discharging the sureties thereon.

"Thereafter, pursuant to leave of the court, further proofs were taken in said cause, and after the same were concluded, and as preliminary to a final order hereon on the merits, by like leave of the court, the petitioners for accounting made and submitted to the court a statement charging, surcharging, and falsifying the alleged final account of Edward P. Ferry as executor of the last will and testament of said deceased already before the court; which statement presented the proposed amendments and objections of petitioners to the said alleged final account of said executor with said estate and stated said account as petitioners claim the same to be."

To sum up the contention between the parties: the executor, Edward P. Ferry, by his guardian *ad litem* and next friend, contended that he had exhibited an account showing nothing due from the executor and entitling him to his discharge. The residuary legatees contended that, upon the account so exhibited, as surcharged, falsified, and restated, the executor upon balance of account owed a large sum. This issue the probate court decided in favor of the residuary legatees and restated the executor's account to conform to the truth of the matter as shown by the proofs.

The question being thus presented the probate court was possessed of jurisdiction to determine the amount owing from Edward P. Ferry to his father's estate, and to direct

payment thereof, and suit might be brought upon the probate court decree for the recovery of the amount thus adjudicated. This is established by the authorities already cited.

This same reasoning applies to the argument of Circuit Judge Sanborn (Record, p. 42) that the general guardians in Utah were without power to bind the person or charge the estate of Ferry in Utah with this claim by their appearance in the Michigan court. This, Judge Sanborn says (Record, p. 42), is because the Michigan court had acquired no jurisdiction over Edward P. Ferry. But it is clear from the authorities already cited that the Probate Court of Ottawa County was possessed under the laws of Michigan of jurisdiction over the subject-matter, to wit, the settlement of the estate of Rev. William M. Ferry. It is likewise clear that it was possessed of jurisdiction over the person of Edward P. Ferry, for he was an officer of the court, and, when he sued out letters testamentary, he submitted himself to the jurisdiction of the court and agreed to receive notice of settlement of his accounts as executor, and to settle the same, and be bound thereby, in manner as provided by the statutes and laws of Michigan. It, therefore, inevitably follows that the decree adjudicating the account is binding on Edward P. Ferry, whether that decree is made as the result of a petition for an accounting filed by the residuary legatees, or as the result of this cross-petition for similar relief and discharge filed by himself through his next friend, or as the result of the adjudication prayed by both petition and cross-petition as in the instant cause. The authorities cited in our first brief (pp. 104-105) maintain that Edward P. Ferry is bound by the decree because, acting by his next friend, he invoked the jurisdiction of the probate court and asked, by way of affirmative relief, that his accounts be settled.

In the closing pages of respondent's brief (pp. 71-74) reference is made to *Lafferty vs. People's Bank*, 78 Mich., 35, and *Hall vs. Grovier*, 25 Mich., 427. We pause at this stage of the argument only for passing comment. It is insisted in

substance that, because in the Lafferty case the effect of the residuary legatee's bond was involved, the rulings on pages 50-51 are *dicta*. But the very points in issue were when the assets of the estate were to be regarded as administered, the character of the holding of the executor, what became of the assets when he was removed, the title of his successor in office, the administrator *de bonis non*. These are the identical questions involved in the instant cause.

It is urged (Brief, pp. 73-74) that *Hall vs. Grevier* is not in point because the administrator, who was held liable in probate court for conversion of moneys of the estate, did not himself retain the moneys, but paid them over to the widow of deceased. We are at loss to perceive by what course of reasoning an executor may be charged as for conversion when his act is done for the benefit of another, but must be granted immunity if he adds the offense of doing the unlawful act for his own aggrandizement.

It is said by counsel (Brief, pp. 65-66) that this is not the case of an absconding debtor who, having despoiled the estate he represents, claims asylum in a foreign jurisdiction, but that it was shown to the court that the residue of the estate had been used for certain purposes foreign to its regular administration under express written authority and direction of the residuary distributees. But these assertions are not borne out by the record.

It is true that Edward P. Ferry claimed to have executed certain mortgages with the assent of the residuary legatees, but it was not made to appear that more than a portion of the assets of the estate were embraced in these mortgages, and no facts were shown which absolved him from his duty to account in probate court; on the contrary, it appeared that the moneys of the estate had been applied to the use of Edward P. Ferry, not for the use of the residuary legatees. The court in which the suit was tried specifically finds (Record, pp. 10, 11, 12):

"That said executor has not accounted for all the moneys and properties of said estate coming to his

hands; that he is not entitled to be discharged from his trust; that at the time of the rendition of his second account, said executor had on hand large sums of money and a large amount of property belonging to said estate, and since that date large amounts, both of money and property, belonging to said estate, have come to the hands of said executor from time to time, down to and including the year 1900—none of which has been accounted for by said executor in this court; that large sums of money belonging to said estate, as well also as many and valuable properties belonging thereto, have come to the hands of said Edward P. Ferry, and have been misappropriated by him and converted to his individual use instead of being applied to or for the benefit of said estate. * * *

"That those acting in behalf of said executor have taken from Michigan to Utah books and papers of said Edward P. Ferry containing his accounts as executor of the last will and testament of his said father, and have refused to return the same when ordered by this court to do so, and have refused to make and render an account of said executor with said estate, except as hereinbefore specified, and so far as lies in their power have suppressed evidence in said cause and endeavored to prevent the decision of said cause on the merits; that it has, therefore, become necessary for this court to state said accounts from the proofs in this cause."

These facts show most clearly the spoliation of the estate by the executor and the claiming of an asylum in a foreign jurisdiction. It is true, as suggested by counsel (Brief, pp. 67-68), that Mr. Justice Grant, in his opinion in Stevens v. Ottawa Probate Judge, spoke of the delay in filing petition for accounting and of the amount of the interest which had accrued. But lapse of time is in Michigan no bar to an express trust, and the delay was fully explained in the testimony taken in probate court, which did not come before the Supreme Court. It is also true that the Supreme Court of Michigan recognized the validity of the decree of the probate court, declared that the questions to which opposing

counsel advert had been passed on in that court and determined against the contention of the executor, and required him to furnish a bond in the sum of \$610,000 as a condition of appeal.

This decree being valid in Michigan is likewise valid in Utah, and we respectfully submit that the decision of the court below, which permits the legatees of this estate to be despoiled of their inheritance, should be reversed.

WILLARD F. KEENEY,
EDWARD B. CRITCHLOW,
HENRY C. HALL,

Attorneys for Petitioner.

CHARLES S. THOMAS,
WALTER I. LILLIE,
Of Counsel.

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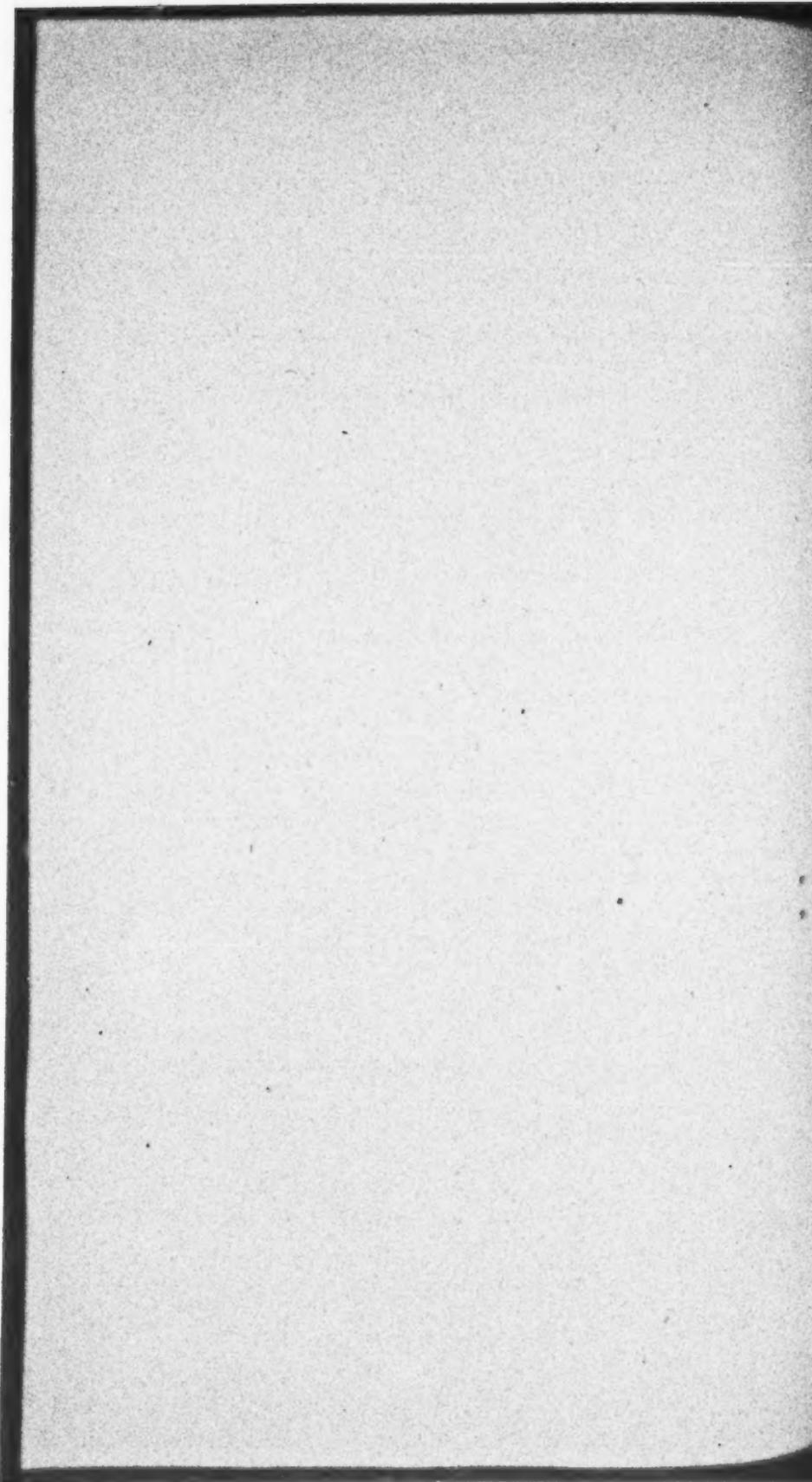
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1912.

No. 200.

THE MICHIGAN TRUST COMPANY, A CORPORATION,
Petitioner,
v.
EDWARD P. FERRY,
Respondent.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

Before the writ of certiorari was issued in the instant case we had been under the impression that this honorable court was not disposed to reach forth the writ in a case of this kind. Our reasons for that impression were advanced in our brief in opposition to the petition for the writ.

This suit was instituted in the then United States Circuit Court in Utah by The Michigan Trust Company,

a Michigan corporation, against Edward P. Ferry, a resident of Utah, and a mentally incompetent person under general guardianship in Utah. The action was based upon an alleged personal judgment for the sum of \$915,355.08 obtained against Edward P. Ferry by constructive service in a proceeding in a probate court in Michigan, a court of limited jurisdiction, which had no power to render or enforce a personal judgment. No personal appearance was made by Edward P. Ferry or his general guardians in the proceeding in Michigan, and no personal service of process was had upon him or his general guardians in Michigan (Record p. 3). The record further discloses that both the process served upon Edward P. Ferry and his general guardians by publication, and the pleadings upon which the alleged personal judgment was based, failed to warn or suggest to the persons so served that a personal judgment was to be taken against the defendant, or that it would be taken against him in favor of The Michigan Trust Company (Record pp. 2-3). The then United States Circuit Court in Utah sustained Edward P. Ferry's demurrer to The Michigan Trust Company's complaint, denied a motion to amend and dismissed the complaint (Record p. 16). The Circuit Court of Appeals of the Eighth Circuit affirmed the judgment of the lower court (Record p. 28).

The material allegations in the complaint and the proffered amendment were briefly these: In 1868 the defendant, Edward P. Ferry, qualified as executor of the will of his deceased father William M. Ferry, in the probate court of Ottawa county, Michigan (Record p. 2). Entering upon the discharge of his duties he paid all the debts and expenses of administration of the estate and the specific legacies created in said will (Record p. 11). He filed two annual accounts of his administration in said probate court,

one in 1869 and the other in 1870 (Record p. 10). In 1878 he removed to Utah and ever since has been and now is a resident of Utah and a non-resident of Michigan (Record p. 11). In 1892 he became mentally incompetent and has ever since remained in that condition (Record p. 11). In 1901 he was adjudged to be a mentally incompetent person by the Third Judicial District Court for the County of Salt Lake State of Utah, and his sons, William Montague Ferry and Edward Stewart Ferry, both citizens of Utah, were appointed general guardians of his person and estate in Utah by the Utah court, and they have acted ever since in that capacity (Record p. 2). At no time since 1901 was Edward P. Ferry personally present within the state of Michigan (Record p. 6). In 1903 certain residuary distributees of his father's estate, and the heirs of one deceased distributee filed a petition in the probate court of Michigan which prayed that said Edward P. Ferry be removed as executor; that he be required to account for the residue of his father's estate which was unadministered and for the appointment of The Michigan Trust Company as administrator de bonis non (Record pp. 2-3). Notice of this hearing was published in a newspaper in Michigan, and a copy of the order fixing the time of the hearing of said petition was served upon Edward P. Ferry and his general guardians in Utah (Record p. 3). Upon an order of the probate division of the Third Judicial District Court in Utah the general guardians in Utah employed attorneys who undertook a defense to the petition filed by the residuary distributees in the probate court in Michigan (Record p. 3). A guardian *ad litem* was appointed by the probate court of Michigan for the non-resident, incompetent executor, and the guardian *ad litem* filed an "answer and cross-petition" in the Michigan probate court in which it was alleged that certain powers

of attorney, written authorizations, mortgages, deeds and other conveyances, constituted a full, complete and final account of the executor for the residuary estate of William M. Ferry. This "answer and cross-petition" prayed that Edward P. Ferry be discharged as executor (Record pp. 5-9).

Upon these issues joined, a hearing was had, and some four years after the filing of the petition,—in December, 1907, the probate court in Michigan entered a decree or order, the material findings of which were: That the estate of William M. Ferry had not been fully administered; that Edward P. Ferry, the executor, had failed to account for the residuary estate; that he was under obligation to do so, and that the probate court therefore had made such an account; that large amounts of property of the estate had been converted to the individual use of said Edward P. Ferry; that Edward P. Ferry, executor, was indebted to the estate of William M. Ferry in the sum of one million, two hundred twenty thousand four hundred seventy-three and forty-four one-hundredths dollars (\$1,220,473.44); that said amount was owing to the estate by Edward P. Ferry, and that he be removed as executor. The Michigan probate court further found as follows (we quote in full the designated paragraphs of the probate court's decree, the italics being ours):

"XIV. It is further ordered, adjudged and decreed that The Michigan Trust Company, a corporation of Grand Rapids, Michigan, be, and it is hereby appointed *administrator de bonis non* with the will annexed, of the estate of said Reverend William M. Ferry, deceased, *such appointment to take effect forthwith upon the filing in this court by The Michigan Trust Company of its acceptance of said trust.*

"XVI. It is made to appear to this court that the said Edward P. Ferry is himself a residuary legatee under his said father's will, and as such is entitled to a one-fourth interest in the residue of said estate, and that it might impose a hardship upon him if he were compelled to pay over to the administrator *de bonis non* with the will annexed that portion of said estate to which, *on final distribution*, he would be adjudged to be entitled. For this reason *no order is made* directing such payment to said administrator *de bonis non* with the will annexed of said one-fourth share of the net balance fixed and determined in paragraph XI of this decree. Said Edward P. Ferry will be excluded from participating in the distribution of the remaining *three-fourths* of the moneys owing under the terms of this decree, except in so far as he may show himself entitled to participate as a distributee of Thomas W. Ferry's estate.

"XVII. The remainder of the indebtedness owing by said Edward P. Ferry, said executor, to the estate of said William M. Ferry, deceased, is the sum of nine hundred and fifteen thousand three hundred and fifty-five and 08-100 dollars (\$915,355.08), and it is further ordered, adjudged and decreed that said Edward P. Ferry is individually liable therefor to the estate of William M. Ferry, deceased, and that, within sixty days from this date, said Edward P. Ferry, said executor, do pay the sum of nine hundred and fifteen thousand three hundred and fifty-five and 08-100 dollars (\$915,355.08) to the Michigan Trust Company, administrator *de bonis non* with the will annexed of the estate of said William M. Ferry, deceased, together with interest on said sum from this date

until paid at the rate of five per cent (5%) per annum." (Record p. 14.)

From this decree the guardian *ad litem* in Michigan attempted to appeal but failed (Record p. 17). Thereupon, as hereinbefore related, The Michigan Trust Company brought this action in the Federal Court in Utah upon the decree of the Michigan probate court to recover from Edward P. Ferry the \$915,855.08.

ARGUMENT.

It is contended for the respondent that the judgment of the Circuit Court of Appeals, affirming the judgment of the *nisi prius* court, was right for the following reasons:

I.

No court under our system of jurisprudence has power to render a personal judgment against one who resides beyond the territorial limits of the court upon constructive service of process on him in the place of his residence and without personal service of process upon him within the jurisdiction of the court, or his voluntary appearance in the proceeding. Such action is beyond the jurisdiction of the court, and any judgment so rendered is absolutely void, and therefore not protected by the full faith and credit clause of the Federal Constitution. The enforcement of such a judgment in another jurisdiction would be a

deprivation of property without due process of law.

Pennoyer v. Neff, 95 U. S. 714, 720.
Insurance Co. v. Bangs, 103 U. S. 435.
Old Wayne Life As'n. v. McDonough, 204
U. S. 8.
D'Arcy v. Ketchum, 11 How. 165, 174, 176.
Galpin v. Page, 18 Wall. 350, 368.
Brown v. Fletcher's Estate, 210 U. S. 82.
Haddock v. Haddock, 201 U. S. 562, 567.
Raher v. Raher, 129 N. W. 494.
Judy, Admr. v. Kelly, 11 Ill. 211; approved
in Lawrence v. Nelson, 154 U. S. 222.
Grover and Baker Machine Co. v. Radcliffe,
187 U. S. 287.

This principle is so well established and so essential to the preservation of human rights and the administration of simple justice that any elaborate discussion of it before this honorable court would seem inappropriate.

The general rule upon this proposition was announced in Galpin v. Page, 18 Wall. 350, in which it was held that the jurisdiction of a state court extends to *all persons and things* within the state, but to *no person or thing* without the state. In the opinion of the court (pp. 367-368), Mr. Justice Field used the following language:

"The tribunals of one state have no jurisdiction over the persons of other states unless found within their territorial limits; they cannot extend their process into other states, and any attempt of the kind would be treated in every

other forum as an act of usurpation without any binding efficacy. * * *

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length, had it not been impugned and denied by the Circuit Court. It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

In its decree the probate court of Michigan attempted to fix the personal liability of Edward P. Ferry for the alleged wrongful conversion of the property of his father's estate of which he had been executor, and to require him to pay the amount of the alleged wrongful conversion out of his individual property. The record discloses that at all times during the particular proceeding in the probate court in

Michigan the defendant was never in Michigan, but was living in Utah and a resident of that state (Record p. 6). That he was under guardianship in Utah, and that whatever property he had was in the custody of the Utah court (Record p. 2). That the notice of the petition which was the basis of the decree of the probate court was served on Edward P. Ferry by publication, and by delivering to him and his general guardians in Utah a copy of the notice, and that neither the notice nor the petition gave the slightest intimation that any personal judgment was sought against Edward P. Ferry (Record pp. 2-3). Upon what principle then can such a decree be upheld? Counsel for the petitioner advance the theory that the probate court of Michigan, having primarily acquired jurisdiction over Edward P. Ferry as executor, still retained jurisdiction over him for all purposes, even to the extent of finding a personal judgment against him for his alleged devastavit upon constructive service of insufficient notice, and that, too, when Edward P. Ferry had removed from the state, had established his residence elsewhere, and was mentally incompetent and his person and property under the exclusive control of a court in a foreign state. Such a theory will not bear analysis and finds no support in text book or case.

In Hilton v. Briggs, 54 Mich. 265, which was a suit upon an administrator's bond where it was insisted that the administrator was bound by the order of the probate court directing him to pay the claim, and that he would not be permitted to present any defense inconsistent with that order, the Supreme Court of Michigan, (pages 268-269) said:

"No person can have a personal obligation established against him in any judicial proceeding without an opportunity to be heard upon it.

"The suggestion made on the argument in this court, that the administrator is to be deemed at all times before the court, and must at his peril take notice of the proceedings, is wholly inadmissible. No prudent person would accept the office of administrator under such a liability; and the assumption of presence, if to be indulged at all, would be a mere fiction of law. *But there must be a better foundation than a fiction of law for a personal judgment.*"

(We have inserted the italics).

Opposing counsel further contend that the appointment of the guardian *ad litem* in the proceeding in Michigan and his appearance by filing a cross-petition under direction of the general guardians of Edward P. Ferry in Utah with the approval of the Utah court, constituted an appearance by Edward P. Ferry in the proceeding in Michigan, and estopped him and his general guardians in Utah from questioning the jurisdiction of the Michigan probate court. Neither is that contention supported by authority. In the opinion of the Circuit Court of Appeals in this case, Sanborn, Circuit Judge, made the following reply to that contention:

"But the appearance of attorneys, guardians, and next friends of a person, or even his own appearance in a court, to defend or prosecute a claim of which that court has jurisdiction, does not and cannot estop him from subsequently challenging the jurisdiction of that court to render a decree in that proceeding to which he never assented, upon a claim of which that court never acquired any jurisdiction. Moreover the probate court of Michigan had no jurisdiction to appoint a guardian *ad litem* to defend, and the guardian

ad litem it appointed had no authority to appear, to defend or to submit to that court any claim of which that court had not previously acquired jurisdiction by lawful service of due process of law upon the defendant (Galpin v. Page, 18 Wall. 350, 365, 373, 21 L. Ed. 959; Insurance Company v. Bangs, 103 U. S. 435, 440, 26 L. Ed. 580), and no service of such process as gave that court any jurisdiction of the claim against his person and estate, founded on the alleged *devastavit*, had ever been made.

"For the same reason the general guardians, the court in Utah, and the attorneys they employed were without power to bind the person or to charge the estate of Ferry in Utah with this claim by their appearance in the Michigan court. The limit of their jurisdiction was over the person and property of the defendant in Utah, and it was beyond their power to bind the former or to charge the latter by any appearance for them in or submission to a court which acquired no jurisdiction thereof, of any claim against either. They could not by their action in Michigan subject the person of their ward and client in Utah to arrest and imprisonment on the process of the Michigan court, or his estate in Utah to decrees by that court upon claims of which it had not otherwise acquired jurisdiction (Brown v. Fletcher's Estate, 210 U. S. 82, 91, 28 Sup. Ct. 702, 52 L. Ed. 966; Insurance Company v. Bangs, 103 U. S. 435, 439, 26 L. Ed. 580), and the presentation by the next friend of the defendant of his claim that the powers of attorney and agreements of the residuary legatees presented a good cause why he should not render any account, and entitled him to a decree closing the estate without such an account, constituted no appearance in the litiga-

tion over the claim for the devasavit and no waiver of the defendant's right to maintain that the probate court of Michigan never acquired jurisdiction thereof." (Record p. 42).

(The italics are ours.)

In *Insurance Company v. Bangs*, 108 U. S. 435, it appeared that in an action by the Insurance Company in the Federal Court in Michigan, a decree was rendered annulling certain life insurance policies issued to James H. Bangs, whose minor son, although a party to the action, was not served personally, but service was made on his general guardian after the minor had left Michigan and gone to Minnesota to reside, leaving no property in Michigan. The general guardian was afterward appointed guardian *ad litem* for the minor, and acted in that capacity. Later, the minor son brought suit in Minnesota on the life insurance policies, and the Insurance Company pleaded the Michigan decree in bar. Mr. Justice Field rendered the opinion of the court, stating that the only matter for consideration was whether the Federal Court in Michigan had jurisdiction of the person of the infant and of the subject matter of the suit. The court said (p. 459) :

"The infant Bangs possessed no property in Michigan when the suit in equity was commenced against him. That suit did not concern any property, real or personal. It was brought to cancel a contract made with his father, and any decree respecting it would necessarily have been *coram non judice*, unless the parties interested were before the court upon service of subpoena or their voluntary appearance. The infant being absent from the state, could not be personally served. * * *

"In all cases brought to enforce or cancel personal contracts, or to recover damages for their violation, the statute requires a personal service of process upon the defendants, or their voluntary appearance. And the equity rules qualify the statute only so far as to allow, in cases of husband and wife, a copy of the subpoena to be delivered to the husband, and in other cases a copy to be left at the dwelling-house, or usual place of abode of the defendant, with some person who is a member of or resident in the family. *In either mode, the defendant is to be served within the district*, and until such service or his appearance, the court has no jurisdiction to proceed or to render a decree affecting his rights or interest. There being here no property of the infant defendant within the district of Michigan, which the court could lay hold of,—and he being absent from it,—there was no foundation laid for any progress by the court in the case. It never acquired jurisdiction over the infant; *it could, therefore, appoint no guardian ad litem for him*, and the decree rendered against him was ineffectual for any purpose."

(We have inserted the italics.)

Again, in the same case, (page 441,) the court said:

"But in none of the cases to which our attention has been called has a judgment been upheld where a guardian *ad litem* had been appointed for a non-resident infant against whom a purely personal demand was prosecuted. If such a case exists, the judgment in it can have no greater force than one rendered for a personal demand against a non-resident upon any other form of constructive

service; and that constructive service will not give jurisdiction in such cases is the established doctrine of this court." (Citing *Pennoyer v. Neff*, 95 U. S. 714.)

The opinion in the case last cited is authority we believe for the following contention: If general guardians had been appointed for Edward P. Ferry in Michigan and were acting in that capacity, and if Edward P. Ferry had just departed from the State of Michigan, and if process had been served personally on the general guardians in Michigan according to its statutes,—even then the Michigan probate court would have had no authority to appoint a guardian *ad litem* for Edward P. Ferry, and a judgment rendered against him, as was attempted in this case, would have been rendered without the court having acquired jurisdiction of his person. Or suppose that Edward P. Ferry was a mentally incompetent person and an executor as alleged, and before he left Michigan a general guardian had been appointed there over his person, he having no property there; that afterwards the incompetent was taken to Utah and general guardians were appointed over his person and estate in Utah and that the same proceedings followed as in this case, except that the general guardian of Edward P. Ferry in Michigan was served personally in Michigan with process in accordance with the statutes of that state,—could the petitioner in such circumstances recover a personal judgment against Ferry? The answer must be "no" under the ruling of this court upon similar facts in *Insurance Company v. Bangs*, *supra*.

The following language of Mr. Justice White in the prevailing opinion in *Haddock v. Haddock*, 201 U. S. 562, is doubtless fresh in the memory of this court:

"Where a personal judgment has been rendered in the courts of a state against a non-resident merely upon constructive service, and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is by operation of the due process clause of the Fourteenth Amendment void as against the non-resident, even in the state where rendered, and therefore, such non-resident in virtue of rights granted by the Constitution of the United States may successfully resist even in the state where rendered, the enforcement of such a judgment."

In *Pennoyer v. Neff*, 95 U. S. 714, a case which has been invariably followed by both Federal and State Courts, Mr. Justice Field announces the principle in the following words:

"The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."

In the recent case of *Raher v. Raber*, 129 N. W. 494, (1911), the Supreme Court of Iowa has held that a statutory provision of Iowa authorizing personal service of notice without the state for the commencement of an action *in personam* on a defendant resident *in the state* violates the provision of the state constitution and of the Constitution of the United States that no person shall be deprived of his property without due

process of law. It is significant in that case that there was no attempt to serve the defendant by substituted service, that is to say, by leaving a copy of the process at his usual place of abode in Iowa. The process was merely served upon the person of the defendant *beyond the state of Iowa*, and the court held that regardless of whether the defendant was a resident or a non-resident of Iowa, a statute allowing service of that kind was unconstitutional because it attempted to give extra-territorial effect to the laws of Iowa.

In the opinion of the Circuit Court of Appeals in this case, Sanborn, Circuit Judge, said:

"What constitutes due process of law is a question which it is the duty of the national courts to exercise their independent judgment to decide when it is properly presented for their decision, notwithstanding the requirement of the Constitution that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. State laws and decisions may not determine for the federal courts what shall be deemed sufficient process of law, sufficient service of process, or sufficient appearance of parties." (Citing *Insurance Co. v. Bangs*, 103 U. S. 485, 489; *D'Arcy v. Ketchum*, 11 How. 176; *Pennoyer v. Neff*, 95 U. S. 714, 722, 723.)

(Record p. 38.)

Moreover, there are no statutes or decisions in Michigan which by any stretch of construction would uphold the decree of the Michigan probate court as a valid money judgment. But should we concede that there were such statutes and decisions it does not follow that the courts of Utah are bound thereby to treat the decree as a valid money judgment.

In *Public Works v. Columbia College*, 17 Wall. 521, upon a complicated state of facts involving the effect of service of process by publication, the court held:

"The clause of the Federal Constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state, applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction, the records are not entitled to credit."

On page 529, the court said:

"No greater effect can be given to any judgment of a court of one state in another state than is given to it in the state where rendered. Any other rule would contravene the policy of the provisions of the constitution and laws of the United States on that subject."

In *Grover & Baker Machine Co. v. Radcliffe*, 137 U. S. 287, judgment was rendered in a Pennsylvania court against the defendant who was served as garnishee of James and John Benge, citizens of Delaware, who had not been personally served with process, but who had given a bond authorizing any attorney of any court of record in the State of New York or any other state to confess judgment against them. Said judgment was entered under a special statute of the State of Pennsylvania, and the judgment was sued over in the Maryland court, where judgment was entered for the defendant. The case was brought to this court. Mr. Chief Justice Fuller, in speaking of the extra-territorial force of the special Pennsylvania statute, (page 299), said:

"But we do not think that a citizen of another state than Pennsylvania can be thus presumptively

held to knowledge and acceptance of particular statutes of the latter state. What Benge authorized was a confession of judgment by any attorney of any court of record in the State of New York or any other state, and he had a right to insist upon the letter of the authority conferred. By its terms he did not consent to be bound by the local laws of every state in the Union relating to the rendition of judgment against their own citizens without service or appearance, but on the contrary made such appearance a condition of judgment. And even if judgment could have been entered against him, not being served and not appearing, in each of the states of the Union, in accordance with the laws therein existing upon the subject, he could not be held liable upon such judgment in any other state than that in which it was so rendered, contrary to the laws and policy of such state.

"The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or of duty, thereby permitting the law of another state to override their own."

Again, in the same case, the court said:

"It is settled that notwithstanding the provision of the Constitution of the United States, which declares that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state' (Art. IV, Sec. 1), and the Act of Congress passed in pursuance thereof (1 Stat. 22; Rev. Stat. Sec. 905), and notwithstanding the averments in the record of the judgment itself, the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding; that the

jurisdiction of a foreign court over the person or the subject matter, embraced in the judgment or decree of such court, is always open to inquiry; that in this respect a court of another state is to be regarded as a foreign court; and that a personal judgment is without validity if rendered by a state court in an action upon a money demand against a non-resident of the state, upon whom no personal service of process within the state was made, and who did not appear."

See also Goldey v. Morning News, 156 U. S. 518, 521.

Barrow Steamship Company v. Kane, 170 U. S. 100, 111.

Bigelow v. Old Dominion C. Min. & S. Co., 225 U. S. 111.

So we say that even though we could concede (which we cannot) that a local law in Michigan allows a personal judgment for a *devastavit* in favor of an administrator *de bonis non* without personal service, still such a judgment would not be entitled to any faith and credit in Utah against a resident of the latter state, for it is the established rule in Utah that a judgment in favor of an administrator *de bonis non* against the former executor is absolutely void.

Reed, Admr., v. Hume, Admr., 25 Utah, 248.

No Court under our system of jurisprudence has power to render a decree in excess of the claim for relief demanded in the process and pleadings in the particular proceeding before it. The enforcement of such a decree would violate the due process clause of the Federal Constitution.

State: *Rosen*, 101 U.S. 562.
Ex parte Lange, 18 Wall. 165, 176.
Fenton v. Gaillard, 8 Johns. 194, 195.
Miner v. People, 102 Ill. 406.
Hansbury v. Neelis, 108 Ill. 403.
Williamson v. Berry, 8 How. 496, 540.
Reynolds v. Shattock, 140 U. S. 254.

This principle is fundamental also and needs no elaborate discussion. Assuming for the purpose of this contention only that Edward P. Ferry had mental capacity and had been personally served with notice in Michigan or had personally appeared in the proceeding in the Michigan probate court, and that the probate court had power to render a money judgment against him, still the decree which it did render against him was in excess of its jurisdiction and void. Neither the petition filed in the probate court nor the notice of the petition gave Edward P. Ferry the slightest warning that a personal judgment was to be taken against him. Both the notice and the petition were confined to the demands that he be removed as executor, that he be required to account for the residue of the

terminal value of his father's estate, and that The Michigan Trust Company be appointed administrator ad bonis non resonandi (pp. 223). At no time during the proceedings, and previous to the rendition of the decree, was the faintest intimation given to anyone that Edward P. Perry was to be charged with waste and conversion and a money judgment rendered against him for his alleged devasavit.

In *Reynolds v. Stockton*, 1840 U. S., 284, it appeared that the Court of Errors and Appeals of New Jersey affirmed a decision of the lower court. The Supreme Court of the United States held that this was correct, for the "first and obvious reason that the judgment of the Supreme Court of New York was not responsive to the issue presented." This court, speaking through Mr. Justice Brewer, used the following language, (page 284), in construing the Full Faith and credit clause of the Federal Constitution:

"Under that section the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other state in and of themselves require. It does not demand that a judgment rendered in a court of one state, without the jurisdiction of the person, shall be recognized by the courts of another state as valid, or that a judgment rendered by a court which has jurisdiction of the person, but which is in no way responsive to the issue tendered by the pleadings and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state."

(The italics are ours.)

Again, in *Williamson v. Berry*, 8 How., 405, (page 448), the court said:

"Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceeded in the judgment. And whenever the right to property is claimed to have been changed under a judgment or decree by a court, and it is set up as a defense in another court, the jurisdiction of the former may be inquired into. The rule is, that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal."

The facts in *Hanifan v. Needles*, 108 Ill., 408, are apposite to the instant case upon this point. In the Hanifan case it appeared that the county court had authority to require an executor to account, and if he failed to do so to remove him. The court gave him notice to appear "and present his accounts of said estate for settlement as said executor." No notice was given to him that he would be removed. The court, however, made an order removing him. In holding that the order of removal was void, on pages 409 and 410 the opinion of the Illinois Supreme Court reads:

"It is a fundamental principle that underlies our whole judicial fabric, that in all proceedings in courts of justice wherein it is sought to deprive the citizen of his property or any right or privilege recognized by law, the party to be affected by them is entitled to reasonable notice of the time and place of hearing, and of the general nature or object of such proceedings. In conformity with this general principle, the county court has no

power or jurisdiction to revoke the letters of an executor or administrator, under the above section, until he is first cited to appear and show cause why his letters shall not be revoked. The citation in this case did not contain the slightest intimation that there was any purpose on the part of the court, or anyone interested in the estate, to remove him from office. It simply directed him to appear on the first day of the next term of the court and present his account of said estate for settlement as said executor. Nor is there any intimation in the citation that he was charged with waste or mismanagement of the estate, as contemplated by the above section of the statute."

Again, in *Monroe v. People*, 102 Ill., 406, which involved the question of the validity of an order of the probate court revoking letters of administration, where no notice had been given that a revocation would be requested, the Supreme Court of Illinois held that the county court acted beyond its jurisdiction in removing an administratrix upon an order to show cause why she should not pay a certain claim, without any notice in said order that the letters of administration might be revoked or the administratrix removed.

In *Fenton v. Garlick*, 8 Johns., 194, it appeared that an action was brought in Vermont against Seth Garlick, as trustee of Samuel Garlick, an absconding or concealed debtor, alleging that Seth Garlick had in his possession property belonging to Samuel Garlick. Seth Garlick appeared in the suit and judgment was rendered against Samuel Garlick. After execution had been returned unsatisfied, the court granted a rule for Seth Garlick to appear and show cause why an execution should not issue on the judgment against him and his property. The rule was served on Seth Garlick per-

sonally in New York, to which place he had removed from Vermont, but he did not appear or answer the rule, and the Vermont court rendered judgment against him, which was sued over in New York, where the case was non-suited, and the non-suit was affirmed on appeal. The court (page 197) said:

"The proceeding against the defendant, as trustee, in the year 1803, was not notice of any proceeding upon which this judgment was obtained, any more than a proceeding, in the first instance, *against an executor or administrator*, would be sufficient to warrant a judgment founded on a *devastavit*. The original suit, in both cases, is rather a proceeding *in rem*, than *in personam*. It is against the assets *in the hands of the executor or trustee*, belonging to the party whom they represent, and there must be a new suit, or a notice which is equivalent to it, before the trustee can be charged in his own private property or person, as for a breach of trust. * * *

"The mere fact of his having formerly had assets or money of Samuel Garlick in his hands, was not sufficient to authorize a judgment against his own property, in his individual capacity, *until opportunity had been given to him to show in what manner he had disposed of those assets.*"

(The italics are ours.)

And Sanborn, Circuit Judge, in the opinion of the Circuit Court of Appeals in this case, said:

"*B* *o* summons or notice was ever served on the defendant warning him that any claim that the Trust Company as administrator *de bonis non* or otherwise was entitled to recover damages for

his maladministration of the estate of his father, would be considered or adjudicated by the probate court in Michigan, no cause of action on behalf of any such administrator was pleaded or suggested in the petition to which his attention was called, the findings and decree of the probate court are that the defendant's indebtedness therefor is to the estate of the father, while the order of the probate court that this debt be paid to the trust company rests upon no cause of action pleaded, and hence it was beyond the jurisdiction of that court and void. *United States v. Walker*, 109 U. S., 258, 265, 267, 3 Sup. Ct., 277, 27 L. Ed., 927. That portion of an order, judgment, or decree of a court that has jurisdiction of the subject matter and the parties to a controversy which is in excess of that jurisdiction is as futile as an entire decree without any jurisdiction. *Ex parte Lange*, 18 Wall., 163, 21 L. Ed., 872; *Bigelow v. Forrest*, 9 Wall., 339, 19 L. Ed., 696; *Day v. Micou*, 18 Wall., 156, 21 L. Ed., 860; *Foltz v. St. Louis & S. F. Ry. Co.*, 8 C. C. A., 635, 639, 60 Fed., 316, 320."

(Record p. 38.)

Counsel for petitioner (on pages 54 and 55 of their brief) contend that a certain order of the Michigan probate court and notice thereof published in 1907, apprised the executor "of just what kind of relief would be sought from the executor." In other words, counsel contend that the particular order and notice of 1907 apprised the executor that a personal judgment was to be taken against him for his alleged conversion.

The record does not justify that contention. The decree of the probate court contains the following recitals relative to the order and notice of 1907:

"Thereafter, pursuant to leave of the court, further proofs were taken in said cause, and after the same were concluded and as preliminary to a final order hereon on the merits, by like leave of the court, the petitioners for accounting made and submitted to the court a *statement charging, surcharging and falsifying the alleged final account* of Edward P. Ferry, as executor of the last will and testament of said deceased, already before the court; which statement presented the proposed amendments and objections of petitioners to the said *alleged final account* of said executor with said estate and *stated said account as petitioners claimed the same to be.* * * * * * It is also made to appear to the satisfaction of the court by affidavit on file that the order of the court touching the examination of the final account of said executor, made on the 6th day of March, 1907, has been duly published as therein directed, giving all persons interested in said estate notice of the same, and that personal notice has also been given to all persons interested of the examination of said final account of said executor." * * *

(Record pp. 9-10.)

(The italics are ours.)

It appears from the foregoing recitals that the greatest possible stretch of construction that could be given to the notice of 1907 was that it apprised "all persons interested" that an *examination* would be made of the executor's "alleged" account, and of what the petitioners claimed said account should be upon their statement charging, surcharging and falsifying the executor's account. There was not the slightest intimation given in that notice that the petitioners were going to claim a money judgment against Edward P.

Ferry personally for his alleged devastavit in favor of anyone. Moreover, on page 6 of the record it appears that at all times since 1901 the said defendant was a resident of the State of Utah, and that he had not at any time since 1901 been personally present within the State of Michigan. Consequently, if the notice of 1907 was served on Edward P. Ferry it must have been served by publication, as it could not have been served upon him personally within the State of Michigan. So in any event, under the authorities we have heretofore discussed such service was not sufficient to give the court jurisdiction to render a money judgment even though the notice had apprised him that such a judgment was sought.

III.

The Probate Court of Michigan is a Court of limited jurisdiction. In the administration of estates of deceased persons its proceedings are in rem and it had no power to render a personal decree. Its decrees create no liens and cannot be enforced by execution.

Rogers v. Huntley, 166 Mich., 129.

Holbrook v. Cook, 5 Mich., 225.

Detroit L. & N. R. Co. v. Probate Judge, 63 Mich., 676.

Hilton v. Briggs, 54 Mich., 265.

Durfee, probate judge, v. Abbott, 50 Mich., 278, 285.

Fourniquet v. Perkins, 7 How., 160, 171.

Kingsberry v. Hutton, 140 Ill., 603.

Freeman on Executions, (3 Ed.) Sec. 10, p. 34.

Ferris v. Higley, 20 Wall., 375.

Grignon's Lessee v. Astor, 2 How., 819.
Schles v. Darrow, 65 Mich., 362.
Grady v. Hughes, 64 Mich., 540.
Home Missionary Society v. Corning, 164
Mich., 895.
Nolan v. Garrison, 156 Mich., 897.
Wilson v. Hartford Fire Ins. Co., 164 Fed., 817.

Should we indulge in the unwarranted assumptions that Edward P. Ferry was of sound mind and personally present at all times in the proceeding in the probate court in Michigan, and that he had been notified that a decree for damages for his alleged maladministration was to be taken against him in favor of proper parties to the proceeding,—even then such a decree would have been beyond the scope of the jurisdiction of the Michigan probate court and void. The probate court of Michigan derives its powers solely from the statutes and to the statutes alone must we look to determine the extent of that court's jurisdiction. (We have attached to our brief an appendix containing the constitutional and statutory provisions of Michigan creating and defining the powers of probate courts, together with certain other statutes later cited.)

Opposing counsel have stated repeatedly that a probate court of Michigan has large and equitable powers, and that it is a court of general jurisdiction in probate matters. Such generalities, like the exhalations of a marsh, shine but to deceive. One might say with equal force that a police court is a court of large and equitable powers and of general jurisdiction in the sorry affairs of the underworld. We are aware that in some jurisdictions, noticeably in New Jersey and in New York, surrogate courts have been given, by express statutory provisions and within certain well defined

limits, some of the powers of courts of equity over administrators and executors. Such powers are not given to probate courts by the Michigan statutes, however, and consequently the New York and New Jersey cases relied upon by the petitioner are not even remotely applicative.

The constitution of Michigan creates probate courts and provides for them such jurisdiction, powers and duties, as may be prescribed by law. Article VI, Sections 1 and 18, Vol. 1, pages 90 and 95, Compiled Laws of Michigan, 1897. (See appendix).

In Section 650, Compiled Laws of Michigan, 1897, Vol. 1, page 316 (see appendix), it is provided that the judge of probate shall have power to take the probate of wills and grant administrations of estates of deceased persons who at the time of their decease are inhabitants or residents of the county, or of those who left property within the county but reside without the state, and to appoint guardians for minors and others in cases prescribed by law.

Section 651 (see appendix) provides that a judge of probate shall have jurisdiction in all matters relating to the settlement of estates of such deceased persons and such minors and others under guardianship.

Chapter 234, Compiled Laws of Michigan, Section 1, Vol. 3, page 2679 (see appendix), provides that the judge of probate may appoint guardians to minors and others being inhabitants or residents in the same county, and also to such as shall reside without the state and have any estate within the same.

The Michigan statutes give the probate court power to remove an insane or non-resident executor. Section 9317, Vol. 3, Compiled Laws of Michigan, 1897, page 2849, and Sec. 9333. (See appendix.)

In Section 9347 (see appendix), it is provided that if an executor fails to render an account after notice,

it shall be the duty of the judge of probate to remove the executor and appoint another person.

In Sections 9818, 9882 and 9885, it is provided that the successor of an administrator may administer the estate *not already administered*. (See appendix.)

In Section 656, Vol. 1, page 317, Compiled Laws of Michigan (see appendix), it is provided that the judge of probate shall have power to keep order in his court and to punish any contempt for his authority, in like manner as such contempt may be punished in the circuit court.

In Section 682 (see appendix) it is provided that when *costs* are awarded to one party to be paid by the other, the said courts respectively may issue execution therefor in like manner as is practiced in the circuit court in other cases.

Section 9490 (see appendix) provides that when it shall appear on the representation of any person interested in the estate that the executor or administrator has failed to perform his duty, the judge of probate may authorize the beneficiary or any person aggrieved by such maladministration, to bring an action on the bond.

Vol. 3, Compiled Laws of Michigan, page 2896, Section 9491 (see appendix), provides that if the executor refuses or omits to perform any order or decree for rendering an account, the judge of probate may cause the executor's bond to be prosecuted.

Section 9492 (see appendix) provides that in suits upon bonds, the proceedings shall be in the name of the judge of probate.

Section 9498 (see appendix) provides that on an application of any person authorized to commence a suit, the judge of probate may grant permission to prosecute the same.

Thus it will be seen that a proceeding for the administration and settlement of a decedent's estate in the Michigan probate court is purely a proceeding *in rem* and not *in personam*. After the settlement of an executor's account, the only additional authority given to probate courts over the executor is to order him to turn over the assets found in his hands as executor, and upon his failure to comply with the order, to remove him or to punish him for contempt. No execution is provided by statute upon a decree of the Michigan probate court settling the account of an executor, and such a decree creates no lien. It is simply a preliminary step toward a plenary suit in a court of general jurisdiction upon the executor's bond, in which the entire question of liability of the executor and his bondsmen is to be determined. *As the alleged money judgment for some nine hundred thousand dollars rendered by the Michigan probate court against Edward P. Ferry created no lien and could not in any circumstances be enforced or collected by execution or otherwise in Michigan, how in good conscience can it be claimed now that the Federal Court in Utah should have given the decree of the Michigan probate court greater effect in Utah than possibly could be given it in Michigan?*

Again, suppose the Michigan probate court, either by publication or by personal service in Utah had notified Edward P. Ferry to file his final account, and had notified him that if he did not do so within a certain time he would be attached and punished for contempt. Under such a state of facts would anyone contend that the Michigan court could seize upon the person of Edward P. Ferry in Utah and take him to Michigan and punish him there for disobedience of the order? If not, by what method did the Michigan probate court obtain jurisdiction of the person of Edward P. Ferry in Mich-

igan to enable it to render a personal judgment against him there?

In *Holbrook v. Cook*, 5 Mich., 225, 228, the Supreme Court of Michigan, said:

"It is true probate courts are 'courts of record,' being declared to be such by the constitution, but they are not 'courts of law,' according to the ordinary use of the term. They derive their origin and jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system. Parties cannot litigate questions of fact in them, except in the instance of probate of wills, or when the power of appointment is to be exercised." * * *

And again the court said:

"They render no judgments, their determinations being called orders, sentences or decrees."

In *Detroit R. R. Co. v. Probate Judge*, 68 Mich., 676, the question involved was the jurisdiction of the probate court in condemnation proceedings, under a special statute purporting to vest such jurisdiction in that court, and while the facts are not directly applicable to this case, the decision is instructive. As reported on page 680, the court said:

"The probate court is a court which, although declared a court of record, and having large and important powers, is nevertheless an inferior court, subject to the review of the circuit courts, and not designed or adapted to the exercise of the ordinary judicial power, in dealing with litigated questions affecting persons not subject to the exercise of prerogative jurisdiction, and entirely *out of jurisdiction*. The jurisdiction over contentious litigation belongs, under the constitution, to courts of law and equity."

Again, in *Hilton v. Briggs*, 54 Mich., 269, (which was a suit upon an administrator's bond for the payment of a claim directed by the probate court to be paid), the court said:

"If the order for the payment of claims does not bind the administrator, neither does the order giving leave to prosecute the bond. That order does not fix the liability of the administrator. If it did, the subsequent suit would be worse than an idle ceremony; for it would uselessly impose upon parties and witnesses an expenditure of time and money, put the county to expense, and impose labor upon the court, for the mere purpose of establishing a liability which was already fixed. The legislature would never require this. *If the liability were fixed, it would be a very simple matter to authorize process from the probate court for its enforcement.* But the order giving leave to prosecute the bond is an order which merely determines that it is proper, under the circumstances, that the claimant should be at liberty to show, if he can, in a court of law, that the administrator and his sureties are under legal obligation to satisfy his claim, or some part of it. *It is in that court that the question of liability is to be tried, and in that court the obligors in the bond are at liberty to meet any case which may be *prima facie* made out against them.*"

(The italics are of our making.)

In *Schlee v. Darrow*, 65 Mich., 362, the probate court made an order finding that the administrator was indebted to the plaintiff in the sum of \$612.00 and directing the administrator to pay this amount to the plaintiff within a specified time, and further providing

that in default of such payment the plaintiff might bring suit upon the administrator's bond. The Michigan Circuit Court on appeal in a hearing *de novo* affirmed the finding of the probate court and suit was accordingly brought on the bond. The Supreme Court of Michigan in reviewing the case (page 875) said in part:

"So much of said judgments of both courts as attempts to fix the amount due from Berner to Schlee and Finison, in an application for leave to sue the bond, is void. Upon such an application, *the probate court cannot pass upon the merits of the controversy which may arise upon the prosecution of the bond, or fix the liability of either principal or surety therein.*"

(The italics are ours.)

In *Kingsberry v. Hutton*, 140 Ill., 608, it is held that a proceeding to settle the accounts of a guardian is not an action at law nor a suit in equity, and the order of the probate court ordering the sum found due to be paid over to the party entitled to receive it, is not a judgment; that no execution can issue, but that the order is enforceable only by attachment.

And in *Lyles v. McClure* (S. C.), 19 Amer. Dec., 648, it is held that the ordinary authorized to settle the accounts of administrators has no power to compel payment of the amount found due.

Fourniquet v. Perkins, 7 How., 160, is particularly apposite to the case at bar upon this proposition. The Fourniquet case arose in the state of Louisiana where probate courts by statute are given at least as much power as the probate courts in Michigan. A petition was filed in a probate court of Louisiana against an administrator, praying that he should account and also that he should be held liable for maladministration and

apolation. The case was transferred to the district court for trial, the judgment was for the administrator, and the petitioners then claimed that the transfer to the district court was unauthorized and that the probate court had plenary jurisdiction. A statute of Louisiana provided that courts of probate "had exclusive power to compel such administrator to render an account when required." (See page 171 of the report.) This court, in defining the jurisdiction of probate courts in Louisiana, said:

"By the authorities cited from the Supreme Court of Louisiana, it is equally apparent that the probate courts are not courts of general, but of special limited jurisdiction; and that from their cognizance are excluded cases of fraud, torts, waste, or maladministration generally, committed by executors and administrators; and that these cases belong peculiarly to the cognizance of the district courts. Such being the conclusions warranted by a review of the law, and the facts of this case being of a character to fall directly and regularly within its operation, it may well be asked what just exception can be taken to the jurisdiction of the district court in this case?"

The court further stated that the jurisdiction of probate courts in Louisiana was confined to cases which seek a settlement and accounting for effects presumed to be in the possession of the representative of a succession, holding those effects in his representative character, and that where it was sought to charge the executor personally for fraud, maladministration, waste or embezzlement of the succession, the court of probate had not jurisdiction, but in such cases, jurisdiction was vested in the district courts.

IV.

In the absence of express statutory authority an administrator *de bonis non* cannot sue a former executor for damages for conversion. No such authority is given an administrator *de bonis non* by the statutes of Michigan. Therefore, if there was a decree rendered by the Michigan probate court in favor of The Michigan Trust Company, the administrator *de bonis non*, for damages for the former executor's alleged conversion, it is void.

Beall v. New Mexico, 16 Wall., 585.

Carrick's Administrator v. Carrick's Executor,
28 New Jersey Equity, 364.

United States to the use of Wilson v. Walker,
109 U. S., 255.

Wilson v. Arlick, 112 U. S., 85.

Reed, Administratrix v. Hume, Administrator, et al., 25 Utah, 248.

Nolly v. Wilkins, 11 Ala., 872.

Hantfan v. Needles, 108 Ill., 403.

Ents v. Smith, 14 How., 400.

Rowan v. Kirkpatrick, 14 Ill., 1-8.

By statute the power of an administrator *de bonis non* of Michigan appointment is limited to the property of the "estate not already administered." (See appendix, sections 9818, 9832, 9835, Compiled Laws of Michigan, 1897.)

Any cause of action for damages for maladministration against a former Michigan executor rests where the common law placed it—in the hands of the creditors

and distributees. It is a recognized rule at common law that all property of an estate which has been converted by an executor,—in short, all property which does not remain in specie,—is considered administered property, and the successor administrator has no power over it whatever.

We have searched the Michigan probate code and fail to find any provision which changes this rule; on the contrary, the Michigan statutes emphasize the common law rule, as section 9885 of the Compiled Laws of Michigan, 1897, enacts that the successor of an administrator may administer the estate *not already administered*.

And, as we have said, the Michigan statutes provide an exclusive way by which a probate court can acquire control over the proceeds of property converted by a former executor, and that is only after the amount of proceeds has been determined and collected in an independent suit in another court upon the former executor's bond. (See appendix, Section 9491, Compiled Laws of Michigan, 1897.) In some states, to be sure, express statutory authority is given the successor administrator to maintain an action in a court of *general jurisdiction* against a former executor for his waste and maladministration. Noticeably in Illinois that authority has been given.

In *Hanifan v. Needles*, *supra*, the Supreme Court of Illinois has held that under such a statute an administrator *de bonis non* might maintain an action of that kind, but in the absence of statutory authority, no such action would lie.

And in *United States to the use of Wilson v. Walker*, 109 U. S., 258, it was announced by this court that an administrator *de bonis non* cannot sue on the bond of a former administrator to recover money collected by him and not paid over and accounted for.

Such a fund was considered administered. To the same effect is *Beall v. New Mexico*, 16 Wall., 535, and this court always has upheld this principle.

The statement by petitioner's counsel that the Michigan probate system is copied from that of Massachusetts is not quite accurate. The case referred to, *Campeau v. Gillett*, 1 Mich., 416, was decided in 1850, but since that time the statutes of Michigan have undergone many changes and there is nothing to show that they are the same now as the Massachusetts statutes relating to this subject.

In *Lafferty v. People's Bank*, 76 Mich., 35, (page 66), Judge Campbell, replying to a similar claim, said:

"It is not true, however, that we copied our probate system from that state (Massachusetts) as it now stands, to any general extent."

But, as we have before said, even if the statutes of Michigan allowed a suit of this nature, it would not be recognized by the courts in Utah, for the Utah courts are not bound to enforce a judgment in another state contrary to the policy, settled rules and decisions of the former state.

In *Reed, Admx., v. Hume, Admr.*, 25 Utah, 248, Millie G. Reed, as administratrix *de bonis non* of the estate of E. A. Reed, deceased, in a court of general jurisdiction, sued Richard T. Hume, as administrator of the estate of George H. Burgitt, deceased, who at the time of his death was the duly qualified and acting administrator of the estate of E. A. Reed, deceased, for an accounting, charging that said Burgitt had never rendered an account of his administration, and alleging that he had appropriated the assets of the estate to his own use. The defendants demurred to the complaint but the trial court overruled the

demurrer and entered judgment for the plaintiff. The Supreme Court of Utah reversed the lower court and directed it to sustain the defendant's demurrer. As reported on page 253, the court said:

"The plaintiff, Millie G. Reed, is in the situation of an administrator *de bonis non*, and at common law such an administrator has committed to him only the administration of the goods, chattels, and credits of the deceased which have not been administered. The administrator *de bonis non* is entitled to all the goods and chattels which remain in specie. Moneys received by the former executor or administrator in his character as such, and kept by itself, will be so regarded; but, if mixed with the administrator's own money, it is considered as converted, or, technically speaking, administered. *Beall v. New Mexico*, 16 Wall., 535, 21 L. Ed., 292. Assets are administered within this rule if they have been in any wise 'converted' or changed in form, either wholly or in part by the original executor or administrator. * * * A conversion of property by an administrator, or a devastavit by him, is manifestly no wrong to, and does not give rise to a cause of action in favor of the deceased. The wrong is done to the heirs, legatees, creditors, and distributees. The cause of action, then, is in them. If the defaulting administrator then dies, another may regularly be appointed to administer the estate still unadministered, and, if there remain in specie anything capable of being identified as the property of the first deceased, the administrator *de bonis non* is entitled to it, and, if it is withheld, a cause of action then arises in his favor, and he may sue. *We can discover nothing in our statutes which in any wise affects the rule here laid down.*"

(The italics are ours.)

In *Nolly v. Wilkins*, 11 Ala., 872, it was held that an administrator *de bonis non* is entitled only to assets remaining in the hands of his predecessor *in specie*, unaltered and unconverted, and it was further held in that case that the "distributees or legatees are the persons who should cite the late administrator to a settlement, and in whose favor a judgment should be rendered."

And in *Ennis v. Smith*, 14 How., 400, it was held that when any part of an estate is changed from what it was to something else, it is administered, and if an administrator *de bonis non* possesses himself of it and charges himself with it, his sureties on the original bond as administrator *de bonis non* are not liable for his waste of the part so charged. This is a clear recognition of the principle that the administrator *de bonis non*, as such, has no right to the custody of any assets except those which remain *in specie*.

*In passing this point it is significant to note that we have been unable to find any case in which an administrator *de bonis non* of Michigan appointment has maintained an action in any court against a former executor for an alleged *devastavit*.*

V.

The decree of the probate court was not in favor of The Michigan Trust Company, for it was not a party to the proceeding upon which the decree was based and therefore it had no right of action upon the decree.

Louisiana Bank v. Whitney, 121 U. S., 284.

Hookpayton v. Russell, 10 Exch., 27.

Bigelow v. Old Dominion Copper Co., 225 U. S., 111.

If we could conceive that an administrator *de bonis non* of Michigan appointment had authority to sue a former executor for an alleged devasavit and that such a suit could be prosecuted in a probate court in Michigan upon constructive service of insufficient notice, still the complaint in this case alleged no cause of action in favor of The Michigan Trust Company, either individually or as administrator *de bonis non*.

The finding in paragraph fourteen of the decree of the probate court is as follows:

"It is further Ordered, Adjudged and Decreed, that The Michigan Trust Company, a corporation of Grand Rapids, Michigan, be, and it is hereby appointed administrator *de bonis non* with the will annexed of the estate of said Reverend William M. Ferry, deceased, such appointment to take effect forthwith upon the filing in this Court by the Michigan Trust Company of its acceptance of said trust."

(Record p. 14; the italics are ours.)

The Michigan Trust Company was not a party to the accounting proceeding in the Michigan probate court, either individually or as administrator *de bonis non*. The proceeding was clearly one by certain residuary distributees and the heirs of a deceased distributee upon their sole petition against the former executor, and no notice was ever given and the prayer in the petition failed to intimate that a money judgment would be taken in favor of anyone,—much less The Michigan Trust Company. The order to pay the sum to The Michigan Trust Company was based upon no cause of action pleaded. It was not until the decree was rendered, and, verily, in the decree itself, that The Michigan Trust Company was for the first time appointed admin-

istrator *de bonis non* and the sum ordered to be paid to it. Moreover, its appointment was to take effect only upon its acceptance of the trust. It never might have qualified as such administrator, and in any event, not being a party to the proceeding, it was in no way bound by the decree. Not being bound itself by the decree, how can it now hope to bind another in its suit on that decree? We believe it is well settled and fundamental that the estoppels of a judgment must be mutual. In commenting upon this feature of the decree, Marshall, District Judge, in sustaining the demurrer to the first complaint filed in the case at bar, used the following language, which we beg to adopt as part of our argument:

"It is evident that there was no decree in favor of The Michigan Trust Company, either individually or as administrator *de bonis non*. The Michigan Trust Company individually was not a party to the proceeding. By the same order, it was for the first time appointed administrator *de bonis non* of the estate of William M. Ferry, deceased, *cum testamento annexo*, but this appointment was only to take effect upon the filing of its acceptance of the trust. This acceptance was not filed until two days thereafter. At the time of the order there was no administrator *de bonis non*, and conceivably, The Michigan Trust Company might never perform the condition on which its appointment depended. This being so, The Michigan Trust Company was in no way bound by the determination by the court of the amount of Edward P. Ferry's indebtedness to the estate, unless it be regarded as in privity with some of the parties to the proceeding. If it is considered in Michigan, as in some states, against the general current of authority, that the right of action

for a devastavit by a prior executor is in the administrator *de bonis non* and not in the residuary legatees, how could such administrator be concluded by a determination to which he was not a party?"

Counsel for petitioner seem to have conceded at one time, at least, the correctness of our contention, for on page 24 of their brief in support of their petition for a writ of certiorari, the following statement appears:

"It should be borne in mind that this accounting in the probate court of Michigan was not in a suit by an administrator *de bonis non* against a former executor, but was the outcome of a petition by the residuary legatees and devisees calling him to account."

On page 25 of the petitioner's brief on the merits, it is stated that The Michigan Trust Company was a party petitioner in Michigan. We believe that this statement is misleading and we repeat that neither The Michigan Trust Company, individually, nor as administrator *de bonis non*, was ever a party petitioner. It is true that early in the proceeding in Michigan the petitioner was appointed special administrator and that during the pendency of the proceeding "Colonel" William M. Ferry, the son of "Reverend" William M. Ferry, and one of the original petitioners, died, and the Michigan Trust Company was appointed administrator of his estate and substituted for him. Also The Michigan Trust Company acted as the administrator in Michigan of the estate of Mary F. L. Eastman, a deceased residuary distributee. In these representative capacities, however, the petitioner must be distinguished

from the administrator *de bonis non* of the estate of "Reverend" William M. Ferry, to whom the payment of this sum sued for was ordered, and also distinguished from it individually.

See Reynolds v. Stockton, 140 U.S., 270
VI.

The decree of the probate court was rendered in favor of the estate of William M. Ferry, deceased. Therefore it is void, because it was not rendered in favor of a legal entity.

McInerey v. Beck, et al., 89 Pac. (Wash.) 180.

Devlin on Deeds, 2nd Ed. Section 187.
Stacy v. Thrasher, 6 How. 60.

The decree of the probate court in paragraph seventeen (Record pp. 14-15) finds that Edward P. Ferry is individually liable to the *estate of William M. Ferry*. The estate of William M. Ferry is a mere name. It possesses no legal entity which would entitle it to prosecute or defend a suit. Any action instituted in the name of the estate of William M. Ferry would be subject to demurrer. If the *estate of William M. Ferry* could not maintain this suit in its own name, certainly The Michigan Trust Company cannot maintain this suit for the estate. The moving parties in the probate court proceeding were the residuary legatees who subscribed to the petition, and any order which properly could have been made against the executor by the probate court in the particular proceeding should have been made in favor of those residuary legatees.

VII.

The decree of the Michigan Probate Court lacks the first essential element of a final judgment because it neither concludes the right of Edward P. Ferry to participate in the trust fund alleged to be owing by him to the estate of his father nor determines the extent of his participation.

Martinez v. International Banking Co., 220 U. S. 214.

Forgay v. Conrad, 8 How., 201, 204.

Louisiana Bank v. Whitney, 121 U. S. 284.

Grant v. Phoenix Ins. Co., 106 U. S. 429.

Holbrook v. Cook, 5 Mich. 229.

After finding the amount alleged to be due from Edward P. Ferry to the estate of his father and attempting to hold him personally liable for the sum and ordering that he pay it to the administrator *de bonis non*, the decree in paragraph sixteen contains this recital:

"Said Edward P. Ferry will be excluded from participating in the distribution of the remaining three-fourths of the moneys owing under the terms of this decree, except in so far as he may show himself entitled to participate as a distributee of Thomas W. Ferry's estate."

(The italics are ours.) (Record p. 14.)

Conceivably Edward P. Ferry may be entitled to half or to the whole of the estate of Thomas W. Ferry, whatever that estate may be. It is apparent

that whatever part of the trust fund Edward P. Ferry is entitled to is left by the terms of the decree itself for future determination. In this connection let us inquire: Could an officer under this decree levy upon Edward P. Ferry's property for the whole amount therein found due from him to the estate of his father, when the very decree itself recites that Edward P. Ferry may be entitled to an indefinite part of the fund? And if not, for what definite sum could an execution issue? The Federal Courts do not entertain actions on orders or decrees which are not final for the same reason that this court will not allow appeals from interlocutory orders. In commenting upon this point, Marshall, District Judge, in his opinion in this case uses the following language, which we adopt:

"It was substantially an order to pay a certain sum into court or to an officer of the court, and was similar in effect to an order removing a trustee, appointing a successor, determining the amount of the trust fund and directing the payment of the amount determined to the successor. The order did not conclude the right of Edward P. Ferry to participate in the final distribution of the trust, nor did it determine the extent of his participation; for it expressly saved his rights as a distributee of the estate of Thomas W. Ferry, deceased. So the court did not undertake to determine the ultimate disposition of the fund. Under these circumstances, the order lacks the elements of a final decree."

In the case of *Forgay v. Conrad*, 6 How. 201, where the question of the finality of a decree was involved, to prevent any misconception of the ruling of the court, Mr. Chief Justice Taney (page 204) said:

"This rule, of course, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like description. Orders of that kind are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the court *until the rights of the parties concerned can be adjudicated by a final decree.*"

(We have inserted the italics.)

In Louisiana Bank v. Whitney, 121 U. S. 284, where an order had been made directing the payment into the registry of the court of the fund to which conflicting claims were made, on motion to dismiss the appeal, Mr. Chief Justice Waite said:

"We have no hesitation in granting the motion. The court has not adjudicated the rights of the parties concerned. It has only ordered the fund into the registry of the court for preservation during the pendency of the litigation as to its ownership. Such an order it has always been held is interlocutory only and not a final decree. Forgay v. Conrad; 6 How. 204; Grant v. Phoenix Ins. Co., 106 U. S. 431. If in the end it shall be found that the fund belongs to the Board of Liquidation, it can be paid from the registry accordingly, notwithstanding the order that has been made. The money when paid into the registry will be in the hands of the court for the benefit of whomsoever it shall in the end be found to belong to."

In the recent case of *Martinez v. International Banking Corporation*, 220 U. S. 214, on an appeal from the Supreme Court of the Philippine Islands in a foreclosure suit where the latter court had directed the entry of a decree in favor of the plaintiff, leaving to the court below a judicial determination of the exact amount for which judgment should be entered, this court dismissed the appeal and Mr. Chief Justice White (page 222) said:

"The objection is that the judgment of the Supreme Court of the Philippine Islands is not a final one. This objection must prevail for the reason that although involving a decision upon the merits of the case, the judgment of the Supreme Court contemplates and requires further proceedings in the lower court not inconsistent with its opinion. *Clark v. Roller*, 199, U. S. 541. The Supreme Court of the Philippine Islands did not in its judgment, as was done in the judgment entered in case No. 79, fix and determine the precise amount for which the trial court should enter judgment. On the contrary, its direction was that judgment be entered 'in favor of the plaintiff in accordance with the decision of this court.' On referring to the opinion it is seen that the Supreme Court deemed that the plaintiff was entitled to a judicial determination of the amount of the indebtedness of Martinez to it. It is patent that the court found that the exact amount could not be determined without further proceedings, since it in effect left the case open in the trial court for a hearing upon the question of the amount of expenses incurred by the bank in and about the real property of Martinez of which it had taken possession."

VIII.

There is no privity between a guardian appointed in one state and a guardian appointed in another state to the same mentally incompetent person. Therefore, an action will not lie against the general guardians of Edward P. Ferry or against Edward P. Ferry personally in Utah on an alleged judgment obtained against him personally in a proceeding in Michigan in which a guardian *ad litem* attempted to act for him as executor.

Vaughn v. Northup, 15 Peters 1.

Stacy v. Thrasher, 6 How. 44.

Johnson v. Powers, 139 U. S. 156.

Brown v. Fletcher's Estate, 210 U. S. 82.

Wilson v. Hartford Fire Ins. Co., 164 Fed.

817.

Again, assuming for the moment that in every other respect the so-called money judgment of the Michigan probate court was regular and valid, and otherwise should be given the faith and credit claimed for it by the petitioner, the fact that it was rendered against Edward P. Ferry in a proceeding in Michigan in which he was represented by a guardian *ad litem* would make the judgment of no binding force in Utah against his person and property under general guardianship in Utah. If there had been property of Edward P. Ferry in Michigan subject to the control of the Michigan probate court, a guardian of his estate, regularly appointed by that court, of course would have power over any property under his control

in Michigan, and could subject it to a judgment in a proper proceeding against the ward or his guardian in Michigan. But such was not this case. This case divulges an unwarranted attempt by an inferior foreign court to bind the ward's property which was and is in *custodia legis* in Utah, and thus beyond the jurisdiction and control of that foreign court.

In *Brown v. Fletcher's Estate*, 210 U. S. 82, it appeared that Brown and Fletcher entered into an agreement submitting to arbitration all their claims and demands, which arbitration was to be under rule of court in a case then pending, and was to bind the heirs and legal representatives of the parties in case of death. After a preliminary award had been filed, Fletcher died, leaving a will which was probated in Michigan, and letters testamentary were issued to his executors there. Fletcher's principal estate and domicile were in Michigan, but he owned two small parcels of land in Massachusetts. An administrator of Fletcher's estate was appointed in Massachusetts, and his executors, children and legatees in Michigan were notified to appear, and that in default thereof, the arbitration would proceed, but they failed to appear. The arbitration proceeded and a final award was made. It was adjudged that the Michigan executors and legal representatives were bound by the award. The decree of the Massachusetts court was filed in the probate court of Michigan as evidence of claim against the estate, but was disallowed by that court, and, on appeal, its disallowance was affirmed by the Supreme Court of Michigan. Thereupon the case was taken to the Supreme Court of the United States where the judgment of the Michigan court was affirmed. This court (page 90) said:

"While a judgment against a party may be conclusive, not merely against him, but also against

those in privity with him, there is no privity between two administrators appointed in different states."

And again, on page 94, the opinion reads:

"The Massachusetts administrator was not a general representative of the estate, and could not bind it by any appearance or action other than in respect to the property in his custody."

In *Stacy, administrator, v. Thrasher*, 6 How., 59, the court, after enumerating the different classes of privity, said:

"An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority."

And in *Johnson v. Powers*, 139 U. S., 161, the court said:

"In the case at bar, the allowance of Johnson's claim by the commissioners appointed by the probate court in Michigan, giving it the utmost possible effect, faith and credit, yet, if considered as a judgment *in rem*, bound only the assets within the jurisdiction of that court, and, considered as a judgment *inter partes*, bound

only the parties to it and their privies. It was not a judgment against Stewart in his lifetime, nor against his estate *wherever it might be*; but *only against his assets and his administrator in Michigan.*"

(The italics are ours.)

Again, in *Brown v. Fletcher's Estate*, *supra*, this court held that a Massachusetts administrator was not a general representative of the estate, and could not bind the estate by any appearance *except as to the property in his custody*. For the same reason, the alleged guardian *ad litem* could not bind or represent Edward P. Ferry except as to the particular property belonging to the incompetent *in the Michigan probate court*. As a matter of fact there was no such property. The guardian *ad litem* in Michigan could not bind property out of the jurisdiction of the courts of Michigan, and which was in the custody and control of the defendant's general guardian in Utah. By the same rule the general guardians in Utah are responsible for the property in their custody to the court from which they derive their power and to no other court.

IX.

Neither the probate court in Michigan nor any other court has power to create a guardian ad litem for a non-resident incompetent executor. The appointment of a guardian ad litem can be made only where the proceeding is against an infant or incompetent, personally, or against his individual property, and then only after first having obtained proper service of process.

15 Enc. of Law, 2nd Ed. 2.

Chambers v. Jones, 72 Ill. 275.

Good v. Norley, 28 Iowa 188.

Frazier v. Parky, 1 Swan (Tenn.) 75, 78.

Galpin v. Page, 18 Wall. 365.

Insurance Co. v. Bangs, 103 U. S. 435.

We have made a thorough search of the books and have been unable to find such a thing as a guardian ad litem for an incompetent executor and the Michigan statutes make no provision for the appointment of such a guardian. There is, to be sure, a guardian ad litem for infants and for insane persons, but the office is only created when it pertains to their own person or property. The accounting in the Michigan probate court involved the property of William M. Ferry deceased,—not the property of Edward P. Ferry. Furthermore, we have been unable to find any authority which concedes to any court in any jurisdiction the right to designate a guardian ad litem for a non-resident incompetent executor and to require that

guardian *ad litem* to render an account for said executor.

A proceeding of this nature, in which a mentally incompetent non-resident was represented in a probate court of another state by such an anomaly as a guardian *ad litem* not for the non-resident personally, but for the non-resident *as executor*, is for any and every purpose void *ab initio*. And certainly no personal judgment against the non-resident could be rendered in such a proceeding where he was so represented and where it is a fact that the non-resident never appeared in the proceeding and was never served personally with process.

In Bouvier's Law Dictionary, a guardian *ad litem* is defined as one appointed to represent the ward in legal proceedings to which he is a party defendant, and the author states that a guardian *ad litem* cannot be appointed until the infant has been brought before the court. It would be idle to discuss what the probate court in Michigan could have done had the incompetent been there, or had there been property of his within that jurisdiction, or had he been served in a proper manner with process in the State of Michigan, because those are not the circumstances of this case.

X.

When the defendant removed from Michigan and judicially was declared mentally incompetent by the Utah court and his person and property taken into the custody of that court under general guardianship proceedings there, his office as executor in Michigan became vacant, and the probate court of Michigan lost all jurisdiction whatever over him. It could not proceed to settle his accounts as executor, even for unadministered assets of his father's estate. Such an accounting could be had only in a suit in equity in which the defendant's general guardians in Utah would be given their day in court. Therefore, any action the Michigan probate court attempted to take against Edward P. Ferry as executor or otherwise was absolutely void.

Bush, Administrator, v. Lindsey, 44 Cal. 121.
Farnsworth v. Oliphant, 19 Barb. (N. Y.) 30.
Chauquette, Administrator, v. Ortet, 60 Cal. 594.

In re Guardianship of Allgier, 65 Cal. 228.
Reither v. Murdock, et al., 67 Pac. 784.
Prince, et al., v. Towns, 33 Fed. 161.
Holzer v. Thomas, 61 Atl. 154 (N. J.)
Comp. Laws of Michigan, 1897, Secs. 650, 651,
8697, (see appendix).

In advancing this proposition we are not unmindful of the expression of the Circuit Court of Appeals

in this case. Speaking through Sanborn, Circuit Judge, after commenting upon the power of the Michigan probate court to remove an executor, to find an account against him, and to appoint his successor, the court said:

"When the office of executor was tendered to him by that court, the statutes of Michigan provided that, if he accepted that office, that court might acquire jurisdiction to determine all these issues between him and the legatees of his father's estate upon service of a notice of the time and place of hearing upon him by publication. That office was tendered to him on the condition imposed by these statutes that the probate court should have the power to call him before it, and to adjudicate these issues for or against him without other warning than a notice published in a newspaper, and he necessarily accepted that condition when he accepted his office. That condition was not limited to instances in which one or more of these issues should arise, while he was in the State of Michigan, but it included all cases in which one or more of these issues should arise *while he was executor*, and was as effective after as before his departure from the state. One who accepts an office, a right, or a privilege bestowed by virtue of the statutes of a state, which provide that the courts of that state may acquire jurisdiction to determine specified controversies between him and others by means of a published notice of hearing thereof, consents to the service of notice in that way and is estopped from denying its sufficiency. By the defendant's acceptance of the office of executor from the Michigan probate court, and by that court's published notice of the time and place

of its hearing, that court acquired plenary jurisdiction to adjudicate, whether or not he should be removed as executor, whether or not he should account for the *unadministered assets of his father's estate*, the true state of that account, and whether or not the Trust Company should be appointed administrator *de bonis non*, and its determination of these issues was conclusive."

(The italics are ours.) (Record p. 34.)

As an abstract proposition we dare say the reasoning of the court of appeals upon that point may be sound. Once having accepted the appointment and assumed the responsibilities as executor of an estate, the sole fact that one absents himself from its jurisdiction does not render the court of his appointment powerless to settle his accounts for *unadministered assets* upon his failure so to do *while he is executor*. Had Edward P. Ferry's status remained unchanged and had he merely absented himself from Michigan with *unadministered assets* in the estate still unaccounted for, he might have continued to be, within certain well defined limits, subject to the call of the Michigan probate court. When an executor dies, however, he ceases to be an executor because of that fact, and the court of his appointment loses all jurisdiction over him whatever. When an executor becomes mentally incompetent and his person and property are beyond the territorial limits of the court of his appointment and under guardianship in a foreign jurisdiction we believe the same rule should apply as in case of death for equally strong reasons. As we read the record it shows that the Michigan probate court failed to find *unadministered assets* in the hands of the former executor, and the only finding by that court was for damages for the former executor's alleged *devastavit*. That finding, for reasons here-

inbefore given, was beyond the probate court's jurisdiction, so a discussion of this proposition to a large extent may be merely academic. Into that field we do not presume to trespass.

But should we be forced to conclude that the Michigan probate court settled an account against Edward P. Ferry, the executor, for unadministered assets in his hands, even such a finding would have been void. When the defendant became mentally incompetent and his person and property were taken into the custody of the law in a foreign jurisdiction, the probate court of Ottawa county, Michigan, lost all power to proceed against Edward P. Ferry in any way. He ceased to exist in that court, either as executor or otherwise. As we have said, the probate court of Michigan, being a court of limited jurisdiction, derives its powers solely from the statutes. We have searched the Michigan statutes and have failed to find any authority whatever given to a probate court to settle the accounts of a former executor who has become a non-resident mentally incompetent person and who is under guardianship in a foreign jurisdiction. *The only authority* retained by a Michigan probate court in such a case over the former executor, is to declare his office vacant.

Revised Statutes of Michigan, 1897, Sec. 9333
(see appendix).

If Edward P. Ferry had remained a resident of Ottawa county, Michigan, and had become mentally incompetent there, and general guardians had been appointed over his person and property in that jurisdiction by the probate court of Ottawa county, it is possible that that court might have retained jurisdiction to settle his accounts as former executor of his

father's estate for any of its *unadministered assets* by virtue of the court primarily having acquired jurisdiction in both of the estates. By statute the probate court of Ottawa county is given jurisdiction of all matters relating to the settlement of estates of deceased persons who at the time of their death resided in that county or left property within the county, and of all minors and incompetents who at the time of their minority or incompetency resided in that county or had property within the county.

Secs. 651, 650 and Chap. 234, Sec. 8697, Compiled Laws of Michigan, 1897, (see appendix).

In this connection we are duly mindful of an *obiter dictum* in the case of *Tudhope v. Potts*, 91 Mich. 490. Commenting upon the general power of the probate court to settle the estates of deceased persons and those under guardianship under the sections we have just cited, the Supreme Court of Michigan (page 493) said: "Under this statute, there is no doubt of the authority of the probate court to bring in the administrator of a deceased guardian, and to order him to render an accounting of the guardianship."

With all respect for the Michigan supreme court, we have considerable doubt of that authority, but we presume the record in that case showed that the administrator of the deceased guardian was also an officer and within the territorial jurisdiction of the same probate court of Michigan that his decedent had been, and of course subject to its orders to account in the particular estate the administrator represented. Even in those circumstances the court felt constrained to say that a proceeding in equity would be an emin-

ently proper one in which to settle the rights of the parties.

A well considered case is *Perrin v. Probate Judge of Calhoun county*, 49 Mich. 342; the opinion was written by the distinguished jurist, Judge Campbell. An administrator *de bonis non* had cited the executor of the previous administrator to produce certain books in the probate court. There was no order in the citation that the executor should account for the previous administrator. The court held that under the Compiled Laws of Michigan, 1871, Sec. 4408 (~~see appendix~~), which provides that any person interested in the estate may bring before the probate judge anyone suspected of possessing writings which tend to disclose the interest of the deceased in any property, entitles an administrator *de bonis non* to cite the executor of the previous administrator to produce certain books or to cite into the probate court any other stranger to the record so suspected. The court further held, however, that such a proceeding is ancillary to a proceeding in equity, and is not a proceeding in a final accounting. The following significant language appears on page 346 of the report:

"If, as seems probable, the aid of equity is necessary to make any effectual determination of the rights of the respective parties in interest, these proceedings, being ancillary, are in no way hindrances, and are valuable aids to enable the parties to know their rights and make their showings, and may materially simplify the equitable litigation, as well as throw light on the final accounting."

Again, the court said (page 345):

"The statute is explicit that the executor of an executor does not *ex officio* occupy his place, and requires an administrator *de bonis non* to do so."

(Citing Compiled Laws of Michigan, 1871, Sec. 4875; see also Compiled Laws of Michigan, 1897, Sec. 9820, appendix.)

This record shows that the process issued by the Ottawa county probate court was in effect a command that Edward P. Ferry's general guardians in Utah render his final account for him as executor of his father's estate in the probate court in Michigan. His guardians in Utah were utterly powerless to respond to such call and no such call could reach them. Yes, "a palsy fallen upon the probate court" in Michigan, to be sure, but also a palsy fallen upon Edward P. Ferry in Utah. Robbed of reason, void of volition, with tongue tied and hands helpless, if any duty of his remains undone, that duty can be performed only by his guardians in Utah, who have no life or obligation beyond Utah's limits. No miraculous call from Michigan could create there those who had no being in that jurisdiction and give them there their day in court. The probate court in Michigan attempted to call upon Edward P. Ferry and his guardians in Utah to do an impossible thing. It further attempted to arrogate to itself the right to determine the effect of lapse of time and changed conditions, fraud, the force of equitable assignments and other questions of legal variety which hitherto have been left for the exclusive determination of our courts of chancery. (See Stevens vs. Probate Judge, 156 Mich., *infra*.)

In *Bush, Admr., v. Lindsey, Admr.*, 44 Cal., 121, it appeared that Elizabeth Keller died, and that her grandson, Michael, was appointed administrator with the will

annexed, and he died without filing an account of his administration. Bush was appointed administrator *de bonis non* of Elizabeth Keller's estate, and Lindsey was appointed administrator of Michael Keller's estate. The plaintiff, as administrator, presented to the defendant the claim of the estate of Elizabeth Keller against the estate of Michael Keller, for the property belonging to the estate of Elizabeth Keller, which had been received by Michael Keller. The claim was rejected and an action was commenced. The court rendered a judgment for the plaintiff and afterward on defendant's motion granted a new trial. As reported on pages 124 and 125, the court said:

"We are referred to no provision of the Probate Act, which authorizes the Probate Court to cite the administrator of an administrator, to settle the account of his intestate with the estate of which he was the administrator, and, after a careful examination of the Act, we find none which confers that authority. The power must be lodged in some tribunal, to require such an account to be taken and settled; and if the Probate Court does not possess it, it must reside in the District Court, as a branch of its equitable jurisdiction. Those who are interested in the estate have an undoubted right to recover from the administrator the money and property remaining in his hands, which belong to the estate; and in order to ascertain the amount of such money and property, an account must be taken. Proceedings having that object in view, bear clearly marked equitable features, and that court has competent authority to hear and determine the matter, unless the Probate Court possesses the exclusive jurisdiction. While the Probate Court possesses generally probate jurisdiction, as was said in matter of will of Bowen, 34 Cal., 688, and

Gurnee v. Maloney, 38 Cal., 87, yet it is not said in those cases, nor in view of the language of the section of the constitution conferring probate jurisdiction can it be held, that the Probate Court has jurisdiction of all matters relating to the estates of deceased persons."

In Farnsworth v. Oliphant, 19 Barb. (N. Y.) 80, the Supreme Court of New York (page 33), said:

"It has often been remarked and decided that the surrogate's court is entirely a creation of the statute, and the surrogate can exercise no power or authority except such as is expressly conferred upon him by the statute."

After referring to the statutes of New York conferring power upon the surrogate, the court (page 34) said:

"Now, it is to be observed, that in none of these sections or provisions is the surrogate authorized or empowered to call the executors or administrators of the deceased general guardian to account. The statute throughout only speaks of the *guardian* and in no case of his *representatives*."

(The italics are ours.)

Again, in *re Guardianship of Allgier*, 65 Cal., 228, it was held that where a guardian dies before making a statement of his ward's estate, his executors had no authority to present his account to a court of probate, nor had such court jurisdiction over the matter. A settlement of the account can be had only in a court of equity by a proceeding against the executors and other necessary parties.

And in *Reither v. Murdock*, 185 Cal., 201, (67 Pac. 784), which was a suit on the administrator's bond and in which the facts are very complicated, it appeared that Murdock was an administrator and the probate court issued a citation requiring him to present an account. Murdock was not served, but the court settled his account, and on appeal it was held that the settlement of the account did not bind his sureties, the Supreme Court of California holding that the probate court lost jurisdiction even over an administrator who has absconded and cannot be found. As reported on page 785, the court said:

"The probate court has only a limited jurisdiction, and its proceedings therein are regulated and governed entirely by statute. It can only settle the accounts of administrators or guardians in the manner prescribed by the Code. Where an administrator or guardian dies or absconds or is beyond the jurisdiction of the court, the proper method, in order to ascertain whether he is liable, and to what extent, so as to bind the sureties on his official bond, is by a proceeding in the nature of a civil action, wherein the sureties are made parties, and have an opportunity to be heard."

California recently has supplied this lack of jurisdiction in probate courts by a special statutory enactment. (Cal. Code of Civil Procedure, Sec. 1839, see appendix). Michigan has not. We have referred to the California cases upon this subject because probate courts of that state had powers fully equal to the probate courts of Michigan. And we have found no other instance in Michigan, and no instance in any other state, of a probate court attempting to settle the accounts of a non-resident mentally incompetent former executor who was under exclusive guardianship in another jurisdiction.

CONCLUSION.

The conditions in the instant case suggest a remedy which is plain and adequate, and the law allows it. The residuary distributees of the estate of William M. Ferry never have been prevented from suing Edward P. Ferry in an action for an equitable accounting in Utah where he easily can be found, and where his representatives stand ready to respond to any just demand against him. The cases are numerous upholding such a proceeding, and it readily will be seen that every worthy consideration makes that course the only proper one to pursue.

Salter v. Williamson, 2 N. J. Eq., 480-489.
Braithwaite v. Harvey, Note to 27 L. R. A.,
101, 112, 116.
Rich v. Bellamy, 14 Fla., 537, 543.
Stilwell v. Carpenter, et al., 59 N. Y., 414-425.
McNutty v. Hurd, 72 N. Y., 518-521.

All the facts and circumstances connected with this case show the grave injustice of allowing the Michigan probate court the great stretch of power which it has attempted to usurp. The mental incompetency of Edward P. Ferry, the death of others interested and the loss of their testimony forever—the unexplained delay of those remaining in instituting the proceeding, are only a few of the circumstances which make the matter one for the exclusive determination of a court of equity. This case does not present the aspect of an "absconding executor," having despoiled the estate he represented, now claiming asylum in a foreign jurisdiction. On the

contrary, this case presents the unprecedented spectacle of a non-resident, mentally incompetent person, residing and under guardianship in Utah, being sued in a probate court in Michigan, and an alleged money judgment taken against him in that court, upon constructive service, for the amount, with interest added, of a residuary estate, without notice that such a judgment was sought, after a lapse of thirty-seven years, after he had been a resident of Utah for twenty-nine years and mentally incompetent for fifteen years, notwithstanding the fact that the court had no jurisdiction or power to render such a money judgment and notwithstanding that it was shown to that court that the residue of the estate had been used for certain purposes foreign to its regular administration, *under express written authority and direction of all the residuary distributees.*

In deciding an appeal by the guardian *ad litem* to reduce a million dollar bond exacted by the Ottawa county probate judge upon the application of the guardian *ad litem* to appeal from the so-called money judgment which could not be enforced by execution and in which application, of course, no stay of execution was asked, the Supreme Court of Michigan made some pertinent comments upon the nature of the proceeding in the probate court. The case is entitled Stevens v. Ottawa Probate Judge, and is reported in 156 Michigan, 526. Grant, Judge, speaking for the court, (page 532), said in part:

"Neither have we before us the testimony taken in regard to the 'powers and authorizations' and what was done under them, except the fact that shortly after they were executed, Edward P. Ferry, to whom the powers of attorney and authorizations were given, executed three trust

deeds or mortgages for the benefit of the creditors of the parties named in the authorizations. These trust deeds or mortgages were properly recorded. The debts of the parties named therein were very large. *It seems evident that the interest of the petitioners in the estate of William M. Ferry was devoted to the purpose mentioned in said authorizations, with the full knowledge and assent of the parties thereto.*"

(The italics are ours.)

Again, on page 534, the opinion reads:

"The judge of probate in his return to the circuit court stated that the balance due from the executor, exclusive of interest, was about \$420,000.00, *a sum considerably larger than that fixed by the inventory of the estate.* Taking this as the amount of the property of the estate and deducting it from the total amount due, it leaves \$800,473.00 as interest. * * *

"The position of the executor has been, and still is, that the execution of the 'powers and authorizations' was a settlement of the estate so far as the residuary legatees were concerned, and that, if the petitioners were in position to call Mr. Edward P. Ferry to an accounting, it is as trustee under those documents, and not as executor."

And on page 536, the following statements appear:

"For thirty-five years the petitioners, legatees under the will of William M. Ferry, took no steps whatever to compel an accounting or to procure the removal of the executor, notwithstanding they knew that for many years he was absolutely incompetent to manage any business and was broken down

physically, and, to some extent at least, mentally, soon after his financial troubles in 1883. * * *

"It may be a doubtful question whether the executor is liable for interest when legatees have authorized him to use their funds for the purposes mentioned in the 'powers and authorizations.' Upon this we now intimate no opinion. It may furnish a good reason why a bond prohibitive of an appeal should not be required. *A silence of thirty-five years, or twenty years after the execution of the 'powers and authorizations,' unexcused, with the knowledge of what was done thereunder, may furnish a reason why interest should not be charged, even if the executor is liable to an accounting.*

"But these are questions which have been passed upon by the probate court and determined against the contention of the relator. The legislature has seen fit to commit to the discretion of that court alone the fixing of the bond in such cases. The appellate court can only determine questions of law upon an application to set aside the order so made."

(The italics are ours.)

DISCUSSION OF PETITIONER'S CASES.

The mere parade of Michigan cases exhibited in the petitioner's brief does not impress us. We have examined them all and they make no show in support of opposing counsel's contentions. Phrases and sentences torn from the context of an opinion may seem to be in point when considered alone, but when taken with the context are far from being applicative. None of the cases holds that assets converted by an executor are still unadministered assets, or that an administrator

de bonis non of Michigan appointment may maintain an action in a probate court or in any other court for the recovery of such assets. None of the cases holds that in an accounting proceeding in the estate of a decedent a personal judgment for a *devastavit* can be rendered against a non-resident mentally incompetent executor by a probate court, much less upon notice that does not apprise the executor that such a judgment may be taken, and that, too, upon merely constructive service of such notice.

For example: Counsel for petitioner cite the case of *Stevens v. Probate Judge*, 156 Mich. 526, as authority for their contention that the probate court of Michigan had the power to render a money decree against Edward P. Ferry. The only question decided in that case was whether under Section 670 of Act No. 92, Public Acts, 1901, it rested in the discretion of the probate judge to fix the amount of the bond on appeal. Curiously enough, while holding that the amount of the bond was discretionary with the probate judge, the Supreme Court of Michigan nevertheless reduced the amount of the bond one-half. The court did not hold that Ferry, the executor, was bound to account in the probate court—much less that the probate court could render a money judgment against him. The concluding part of the opinion is significant. We beg to quote from it again:

"A silence of 35 years, or 20 years after the execution of the 'powers and authorizations' *unexcused*, with the knowledge of what was done thereunder, may furnish a reason why interest should not be charged *even if the executor is liable to an accounting*. These are questions which have been passed upon by the probate court and determined against the contention of the relator. The legislature has seen fit to commit to the discretion of that court alone the fixing of the

bond in such cases. The appellate court can only determine questions of law upon an application to set aside the order so made. Power is not given to this court to review that discretion even though the bond required should be prohibitive of an appeal.

"It follows that the order of the probate judge must be so modified as to require a bond in one-half the amount found by that court to be due from the executor, namely, \$1,220,478.44. The costs of this appeal will abide the final hearing upon the merits should an appeal be made." (We have inserted the italics.)

The case of *Norford v. Duffenbacker*, 54 Mich. 593, cited in petitioner's brief, was an action in ejectment, in which the effect of an order of the probate court was considered incidentally. Judge Cooley, in delivering the opinion of the court, remarked that the probate courts of the State of Michigan are courts of general jurisdiction in probate matters, and that all presumptions are that their actions when properly invoked are rightful. We take no issue with those statements. The qualifying phrase "in probate matters" is tantamount to saying that probate courts are courts of limited jurisdiction, and they can act only when that jurisdiction has been "properly invoked."

Equally inapplicable to this case is *Cheever vs. Ellis*, 134 Mich. 645. That case was an action for an accounting brought by the bondsmen and a special administrator of the deceased executor against the surviving executrix. It appeared that the deceased executor had filed his own account in the probate court before his death, and after his death the parties by mutual consent transferred the taking of proof on the account to the court of chancery. There is not the slightest intimation in the opinion that an order by a probate court finding an amount due from a non-resident executor, and that, too, when the executor

does not appear in the proceeding, amounts to a personal judgment as for a devasavit.

The cases of Lafferty v. The People's Bank, 76 Mich. 35, and Hall v. Grovier, 25 Mich. 427, are relied upon and cited by counsel for the petitioner as authority for their contention that the Circuit Court of Appeals "erred in holding that, under the laws of Michigan, assets of an estate which have been converted by an executor and appropriated to his own use are 'administered' assets, and that the probate court of Michigan had no jurisdiction to require the defaulting executor to account for such converted and misappropriated assets," and that such holding was "in direct conflict with the rule laid down in Michigan." (Petitioner's Brief, page 8.)

In Lafferty v. People's Bank, *supra*, which was a suit to quiet title to land, Asenath Cook, an executrix and residuary legatee of the estate of Olney Cook, deceased, had given bond to pay all the debts of the deceased, as permitted by the Michigan statutes, which provided that an executor, if he be also residuary legatee, may, instead of giving the usual executor's bond, "give a bond in such sum and with such sureties as the court may direct, with a condition only to pay all the debts and legacies of the testator; and in such cases he shall not be required to return an inventory." The People's Bank, a creditor of the deceased, claimed that the bond was insufficient, and prayed that she be required to give a new bond, which was ordered to be given, but was not filed within the prescribed time, and the executrix was removed. Before such removal she gave a warranty deed of the land described in the bill of complaint to one Parsons, who executed and delivered a deed of said land to the plaintiff. An administrator *de bonis non* and commissioners of claims were appointed, and the defendant's claim was

allowed for \$13,981. Such proceedings were thereafter had that the land in question was sold at administrator's sale, and the sale was confirmed by the probate court. The complainant brought suit in equity to quiet title to the land, claiming that Asenath Cook, being the residuary legatee named in the will, and having filed a residuary legatee's bond, became, by reason thereof, the absolute owner of all the real and personal property belonging to said estate. The defendant contended that the land in question was subject to the payment of the claims of creditors.

As stated by the court, the questions presented by the record were:

"(1) Does the filing of a residuary legatee's bond destroy and render nugatory the provisions of the statute, and in this case the last will of the testator, charging his estate with the payment of all his debts? (2) Does the filing of a residuary legatee's bond, and its approval by the judge of probate, close the administration proceedings absolutely, so that the probate court has no further jurisdiction over the executor and over the administration of the estate of the testator?"

The court held that the bond did not have that effect, and that the property was subject to the payment of creditor's claims.

We have recited the facts thus fully to show that the case is not in point, and does not support the proposition contended for by counsel for petitioner. The purpose of the suit was to determine the title to certain real estate, and the question of conversion by the executrix was not involved in the case, as her grantee claimed to be the absolute owner of the land by reason of the giving of the residuary legatee's

bond, which the court held did not have the effect to transfer the title to the legatee, as she had not paid the debts of the deceased.

Neither is the case of *Hall v. Grovier*, *supra*, authority upon this point, because there was no question of conversion involved in that case. As stated by counsel for petitioner in their brief, that was a case where "an administrator received money which in fact belonged to the estate of the decedent, as he was reliably informed before rendering his final account," and the Court held that it was "no excuse for his neglect to charge it in his administration account in the probate court that at the time he so received it he did not know that it belonged to the estate, but supposed in good faith it belonged to the widow of the decedent, for whom he received it and to whom in effect he turned it over."

The foregoing statement of facts precludes the possibility of there having been a conversion of assets by the executor, for the reason that the money was turned over in good faith to the widow, and hence the administrator could not have converted it to his own use. The administrator had failed to ascertain who was entitled to the money which he had received, and, by an honest mistake, had paid it over to the widow. The court held, in effect, that it was his duty to have ascertained whether the money belonged to the estate, and that he should be held to account for it. It was said by the court in that case:

"His ignorance of the true title, if he was ignorant of it, when he received the money, had not led to its application under the trust in some way foreign to the legal destination, [as would have been the case if he had converted it to his own use] and no fact was shown or suggested

of a nature to excuse him, as administrator, from being debited with the amount."

(The words in brackets are ours).

It is respectfully suggested that the quotations cited in the brief of counsel for petitioner must be construed with reference to the facts involved in each particular case; and, as stated by the Supreme Court of Michigan in the Lafferty case, *supra*, "some of the expressions used in deciding them, if taken in their broadest sense, disconnected from the points in controversy, cannot be applied to the solution of the questions before us."

(The italics are of our making.)

These are only a few examples of the cases relied on by the petitioner. The cases cited are so numerous that a more detailed discussion of them would seem inappropriate in this brief, but they are no more applicable to this case than those which we have distinguished.

With acknowledgments to opposing counsel, we adopt the cases of *Lafferty v. People's Savings Bank*, *supra* and *in re Sanborn's Estate*, 109 Michigan 191. In the former case the court in the prevailing opinion (page 51) said:

"Under our system, the settlements of estates of deceased persons are essentially proceedings *in rem*."

And Campbell, J., in a dissenting opinion, but in which the above principle was reaffirmed, on page 68, used these words:

"And every person claiming to be a creditor is bound by the proceedings from beginning to end.

unless he appeals from them, precisely as in bankruptcy, and other proceedings *in rem*, and because they are in *rem*. * * * There is no instance in jurisprudence where constructive service is lawful, except when the court acts *in rem*. No personal effect can be given to judgments, without personal service. This is elementary. And accordingly, when the *res* ceases to be within the jurisdiction, the jurisdiction itself ceases."

Citing Durfee v. Abbott, 50, Mich. 279.
(The italics are of our making.)

In re Sanborn's Estate, supra, the following principle was announced (we quote from the syllabus):

"Before an executor is entitled to a discharge from official responsibility as such, on the ground that the fund coming into his hands as executor has, pursuant to the terms of the will, become converted into a trust fund, for which he is only liable as trustee to account in a court of equity, he must show some act done to change the character of his holding, and that the fund is properly placed."

Our contention always has been and still is that by acting under the express authority and direction of all the residuary distributees in converting the residuary estate of his father to a purpose foreign to its regular probate administration, the *res* of the estate ceased to be within the jurisdiction of the Michigan probate court, and the jurisdiction of the probate court in the entire matter thereby ceased, and if an accounting is to be had, it must be had with Edward P. Ferry, as trustee, in a court of equity.

Again we say this case does not disclose "an absconding executor." We hold no brief for such an one. We are not before this court seeking immunity for a recreant trustee by a technical defense. But we are defending against an unprecedented attack the person and property of one whose lips long since were sealed. Time may have failed to minister to a mind diseased, but we pray the passage of years has preserved to us the healthy presumption that a man now mute acted honestly in an ancient affair.

We respectfully submit our cause for the early determination of this honorable court.

GEORGE SUTHERLAND,
FRANKLIN S. RICHARDS,
EDWARD STEWART FERRY,
Attorneys for Respondent.

APPENDIX.

(We have inserted the italics hereinafter used.)

Comp. Laws of Michigan, 1897, Vol. 1, Const. of Michigan, Art. VI, Secs. 1 and 13, pages 90 and 95:

"Sec. 1. The judicial power is vested in one supreme court, in circuit courts, in probate courts and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities."

"Sec. 13. In each of the counties organized for judicial purposes, there shall be a court of probate. The judge of such court shall be elected by the electors of the county in which he resides, and shall hold his office for four years and until his successor is elected and qualified. *The jurisdiction, powers and duties of such court shall be prescribed by law.*"

Comp. Laws of Michigan, 1897, Sec. 650, Vol. I, p. 316:

"Sec. 5. The judge of probate for each county shall have power to take the probate of wills, and to grant administration of the estate of all persons deceased, who were at the time of their decease inhabitants of, or residents in the same county, and of all who shall die without the state, leaving any estate within such county to be administered; and to appoint guardians to minors and others in the cases prescribed by law, and shall have and exercise all such other powers and jurisdiction as are or may be conferred by law."

Comp. Laws of Michigan, 1897, Sec. 651, Vol. I, p. 317:

"Sec. 6. The judge of probate shall have jurisdiction of all matter relating to the settlement of the estate of such deceased persons, and of such minors, and others under guardianship: Provided, however, that the jurisdiction hereby conferred shall not be construed to deprive the circuit court in chancery, in the proper county, of concurrent jurisdiction as originally exercised over the same matters."

Comp. Laws of Michigan, 1897, Vol. 3, Sec. 9317, p. 2849:

"Sec. 9. If an executor shall reside out of this state or shall neglect, after due notice given by the judge of probate to render his account and settle the estate according to law, or to perform any decree of the court, or shall abscond or become insane, or otherwise incapable or unsuitable to discharge the trust, the probate court may remove such executor."

Comp. Laws of Michigan, 1897, Vol. 3, Sec. 9347, p. 2859:

"Sec. 3. In case any such executor, administrator, or guardian shall fail to appear at the time and place specified in the notice or to render to the judge of probate a satisfactory statement of his accounts, then it may be lawful, and shall be the duty of the judge of probate to remove such executor, administrator, or guardian, and to appoint some suitable person in his place,

who shall give the same bonds, discharge the same duties, and be liable to the same penalties as is now provided by law."

Com. Laws of Michigan, 1897, Vol. 3, Sec. 9318, p. 2849:

"Sec. 10. When an executor shall die or be removed, or his authority shall be extinguished, the remaining executor, if there be any, may execute the trust; and if there shall be no other executor, administration, with the will annexed, may be granted of the estate *not already administered.*"

Comp. Laws of Michigan, 1897, Vol. 3, Sec. 9332, p. 2855:

"Sec. 11. When any sole executor or administrator shall die, without having fully administered the estate, the probate court may grant letters of administration with the will annexed, or otherwise as the case may require, to some suitable person, to administer the goods and estate of the deceased, *not already administered.*"

Comp. Laws of Michigan, 1897, Vol. 3, Sec. 9335, p. 2856:

"Sec. 15. An administrator, appointed in the place of any former executor or administrator, for the purpose of administering the estate *not already administered*, shall have the same powers, and shall proceed in settling the estate in the same manner, as the former executor or administrator should have had or done; and may prosecute or defend any action commenced by or against the former executor

or administrator, and may have execution on any judgment recovered in the name of such former executor or administrator."

Comp. Laws of Michigan, 1897, Vol. 1, Sec. 656,
p. 317:

"Sec. 12. The judge of probate shall have power to keep order in his court, and to punish any contempt of his authority, in like manner as such contempt may be punished in the circuit court."

Comp. Laws of Michigan, 1897, Vol. 1, Sec. 682,
p. 324:

"Sec. 38. When costs are awarded to one party to be paid by the other, the said courts, respectively, may issue execution therefor, in like manner as is practiced in the circuit courts in other cases."

Comp. Laws of Michigan, 1897, Vol. 3, Sec. 9490,
p. 2895:

"Sec. 4. When it shall appear, on the representation of any person interested in the estate, that the executor or administrator has failed to perform his duty in any other particular than those before specified, the judge of probate may authorize any creditor, next of kin, legatee, or other person aggrieved by such mal-administration to bring an action on the bond."

Comp. Laws of Michigan, 1897, Vol. 3, Sec. 9491,
p. 2896:

"Sec. 5. Whenever an executor or administrator shall refuse or omit to perform any order or decree made by a judge of probate having jurisdiction, for rendering an account, or upon a final settlement, or for the payment of debts, legacies or distributive shares, such judge of probate may cause the bond of such executor or administrator to be prosecuted, and the moneys collected thereon shall be applied in satisfaction of such order or decree, in the same manner as such moneys ought to have been applied by such executor or administrator."

Comp. Laws of Michigan, 1897, Vol. 3, Sec. 9492,
p. 2896:

"Sec. 6. In all suits upon such bonds, the writ and proceedings shall be in the name of the judge of probate, and when the action is brought for the benefit of any particular person as creditor, next of kin, or legatee, as provided in this chapter, the execution shall express that it is for the use of such creditor, next of kin, or legatee, and in such case the person for whose use the action is brought shall be deemed the plaintiff."

Comp. Laws of Michigan, 1897, Vol. 3, Sec. 9493,
p. 2896:

"Sec. 7. On the application of any person authorized by this chapter to commence a suit on such bond, the judge of probate may grant permission to such person to prosecute the same, and

shall thereupon furnish to the applicant, on his paying the legal fees, a certified copy of the bond, together with a certificate that permission has been granted to prosecute it, and the name and residence of the applicant."

Comp. Laws of Michigan, 1897, Vol. 3, Sec. 9333,
p. 2855:

"Sec. 12. If an administrator shall reside out of this state, or shall neglect, after due notice by the judge of probate, to render his account and settle the estate according to law, or to perform any decree of such court, or shall abscond or become insane, or otherwise unsuitable or incapable to discharge the trust, the probate court may, by an order therefor, remove such administrator, and every executor and administrator, upon his request, may be allowed to resign his trust, when it shall appear to the judge of probate proper to allow the same: Provided, such executor or administrator shall, prior and up to the time of his resignation, settle and adjust his accounts with the estate of which he may be executor or administrator; Provided, further, that the sureties of such executor or administrator shall not be released from liability until such executor or administrator shall have fully adjusted his accounts as aforesaid."

Comp. Laws of Michigan, 1897, Chap. 234, Sec. 8697, p. 2679, Vol. 3:

"Section 1. The judge of probate in each county, when it shall appear to him necessary or convenient, may appoint guardians to minors and others, being inhabitants or residents in the same

county, and also to such as shall reside without the state, and have any estate within the same."

Comp. Laws of Michigan, 1897, Sec. 9820, Vol. 3, p. 2849, adopted from Comp. Laws Mich., 1871, Sec. 4375:

"Sec. 12. The executor of an executor shall not, as such, have any authority to administer the estate of the first testator; but on the death of the only surviving executor of any will, administration of the estate of the first testator, *not already administered*, may be granted with the will annexed, to such person as the probate court may judge proper."

Cal. Code of Civil Procedure, Sec. 1639:

"EXECUTORS OR ADMINISTRATORS, IN CASE OF DEATH OF, PERSONAL REPRESENTATIVE TO PRESENT ACCOUNT. If an executor or administrator dies, his accounts may be presented by his personal representatives to, and settled by, the court in which the estate of which he was executor or administrator is being administered, and, upon petition of the successor of such deceased executor or administrator, such court may compel the personal representatives of such deceased executor or administrator to render an account of the administration of their testator or intestate, and must settle such account as in other cases."